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No. 10312

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*Vol 1*  
**United States**  
**Circuit Court of Appeals**  
*2320*  
**For the Ninth Circuit.**

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MACCO CONSTRUCTION COMPANY,  
a corporation,

Appellant,

vs.

A. L. FARR, R. P. SINCLAIR and YOUNG &  
SON CO., LTD., a corporation,  
Appellees.

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**Transcript of Record**

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Upon Appeal from the District Court of the United States  
for the Northern District of California,  
Southern Division

**FILED**

DEC 15 1942

PAUL P. O'BRIEN,  
CLERK



No. 10312

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United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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MACCO CONSTRUCTION COMPANY,  
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Southern Division



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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## NAMES AND ADDRESSES OF ATTORNEYS

### MESSRS. SCHELL & DELAMER

215 West Seventh Street

Los Angeles, California

Attorneys for Defendants and Appellants,

### PHILLIP BARNETT, Esq.,

111 Sutter Street

San Francisco, California

Attorney for Plaintiffs and Appellees.

In the Superior Court of the State of California  
in and for the City and County of San  
Francisco.

No. 300833

A. L. FARR, R. P. SINCLAIR,

Plaintiffs,

vs.

MACCO CONSTRUCTION COMPANY, a cor-  
poration, BEN F. WELLS, JOHN DOE,  
RICHARD ROE, BLACK AND WHITE  
COMPANY,

Defendants.

## COMPLAINT FOR DAMAGES

(Breach of Contract)

Now come the plaintiffs above named and for  
cause of action against defendants, and each of  
them, allege the following facts:

### I.

That defendants John Doe, Richard Roe and  
Black and White Company are sued herein under  
fictitious names as their true names are presently  
unknown to plaintiffs who pray leave of Court to  
insert the same herein upon ascertainment, to-  
gether with proper charging allegations.

### II.

That defendant Macco Construction Company, at  
all times herein mentioned, was and now is a cor-

poration organized [1\*] and existing pursuant to the laws of the State of California.

### III.

That on or about the 3rd day of December, 1940, defendants and plaintiffs entered into an oral agreement in the City and County of San Francisco, State of California, wherein and whereby plaintiffs agreed to furnish four (4) automobile trucks and the personal services of plaintiffs in the operation of the same, and defendants agreed to hire the exclusive personal services of said plaintiffs and said truck equipment for the entire duration of that certain grading and excavating project of defendants situated in the said City and County of San Francisco; that relying upon said oral agreement and pursuant thereto, plaintiffs did purchase said number of automobile trucks and defendants did hire the personal services of plaintiffs and the use of said equipment for a period commencing on the 3rd day of December, 1940.

### IV.

That on or about the 18th day of January, 1941, the defendants, without cause, discharged the plaintiffs and refused to allow said plaintiffs with said equipment to continue performance on said project as aforesaid agreed; that plaintiffs have performed all covenants, promises and conditions on their part to be performed under said oral agree-

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\*Page numbering appearing at foot of page of original certified Transcript of Record.

ment; that plaintiffs at all times herein mentioned were willing and able to continue performance of all the promises, conditions and covenants on their part to be performed under said oral agreement.

## V.

That under and pursuant to said oral agreement the defendants agreed to pay unto plaintiffs as and for compensation for said services and the use of said equipment, the sum of \$2.70 per hour per truck and in addition thereto the sum of \$1.30 on account of the payment of the salary of the driver of each [2] truck; that the period contracted for as aforesaid was and is approximately four months; that the difference between the cost of operation of said trucks and the contract price was approximately in the sum of Sixteen hundred (\$1,600) Dollars per month; that by reason of the said breach of contract by defendants these plaintiffs have been damaged in the total sum of Six Thousand Four Hundred (\$6,400.00) Dollars.

## VI.

That plaintiffs relying upon said oral agreement, and with the knowledge of defendants, did expend the sum of Three Hundred (\$300.00) Dollars for licenses, permits and miscellaneous expenditures all in advance, to enable plaintiffs to furnish their services and equipment to defendants for the period contracted for as aforesaid.

Wherefore, plaintiffs pray judgment against defendants and each of them for damages in the total



sum of Six Thousand Seven Hundred (\$6,700.00) Dollars in accordance with the foregoing allegations, for their costs of suit incurred herein, and for such other, further and different relief as to the Court may seem just in the premises.

PHILLIP BARNETT

Attorney for Plaintiff. [3]

State of California,  
City and County of San Francisco—ss.

A. L. Farr, being duly sworn, deposes and says:

That he is one of the plaintiffs in the above entitled action; that he has read the foregoing complaint for damages and knows the contents thereof; that the same is true of his own knowledge, except as to those matters therein stated on information or belief; and as to those matters that he believes it to be true; that he makes this verification on behalf of R. P. Sinclair and himself.

A. L. FARR

Subscribed and sworn to before me this 28th day of February, 1941.

[Seal] VIOLET NEUENBURG

Notary Public, in and for the City and County of  
San Francisco, State of California.

[Endorsed]: Filed Mar. 3, 1941 (Superior Court). [4]

[Title of Superior Court and Cause.]

PETITION FOR REMOVAL TO  
FEDERAL COURT

To the Honorable the Superior Court of the State  
of California in and for the City and County  
of San Francisco:

The petition of Macco Construction Company, a  
corporation, one of the defendants above named,  
respectively shows as follows:

I.

That said petitioning defendant is a corporation  
organized and existing under and by virtue of the  
laws of the State of Nevada, and having its prin-  
cipal place of business in the City of Carson City,  
County of Ormsby, State of Nevada, and that said  
petitioning defendant was at the time of the com-  
mencement of this action, and ever since has been  
and still is, a resident of and citizen of said State  
of Nevada.

II.

That said cause is a civil action, to-wit: an ac-  
tion for damages for an alleged breach of con-  
tract of employment and for use [5] of equipment  
in connection with a certain grading and excavat-  
ing project of said petitioning defendant situated  
in the said City and County of San Francisco,  
known and referred to as the Bethlehem Steel Cor-  
poration contract, and that at all times mentioned  
in plaintiffs' complaint herein said petitioning de-

fendant was the sole and only person, firm or corporation in charge of the work being done under and pursuant to said Bethlehem Steel Corporation contract, said petitioning defendant being the contractor, and the only contractor, with respect to said Bethlehem Steel Corporation contract.

### III.

That the controversy involved in this action is solely between citizens of the United States residing in and citizens of different states of the United States, to-wit: between plaintiffs A. L. Farr and R. P. Sinclair, who, said petitioner is informed and believes and therefore alleges, are citizens of the State of California, and the petitioning defendant, which is a citizen of the State of Nevada.

### IV.

That the matter in dispute in this action exceeds in value the sum of Three Thousand Dollars (\$3,000.00), exclusive of costs, as appears from the allegations in the first amended complaint filed in said action, which allegations are incorporated herein by reference with the same force and effect as if fully realleged and restated herein for the purpose of showing the amount of the matter in dispute herein.

### V.

That your petitioning defendant desires to remove said action before the trial thereof into the next District Court of the United States of

America, to be held in the Northern District of California, Southern Division.

## VI.

That said petitioning defendant herewith presents a good [6] and sufficient bond, as provided by the statutes in such cases, that said petitioning defendant will enter into such District Court of the United States within thirty (30) days from the filing of this petition a certified copy of the record in this suit, and conditioned for the payment of all costs which may be awarded in this action by the said court, if the said District Court holds that said action was wrongfully or improperly removed thereto.

## VII.

That this petitioning defendant has not to date been served with summons or complaint in this action and that, therefore, its time to appear herein and plead to said complaint has not expired as of the date of the filing of this petition, and that no other pleading to said complaint has heretofore been filed herein by your petitioner.

## VIII.

That in said complaint it is alleged that on or about the 3rd day of December, 1940, defendants (including Macco Construction Company, a corporation, your petitioner herein, Ben F. Wells, John Doe, Richard Roe and Black & White Company) and plaintiffs entered into an oral agree-

ment in the City and County of San Francisco, State of California, wherein and whereby plaintiffs agreed to furnish four (4) automobile trucks and the personal services of plaintiffs in the operation of the same, and defendants agreed to hire the exclusive personal services of said plaintiffs and said truck equipment for the entire duration of that certain grading and excavating project of defendants situated in the said City and County of San Francisco; that said petitioning defendant is informed and believes and upon such information and belief alleges that, in referring to "that certain grading and excavating project of defendants situated in the said City and County of San Francisco", said complaint refers to said Bethlehem Steel Corporation contract; that said petitioning defendant is informed and believes and upon such [7] information and belief alleges that it is not true that the defendants mentioned in said complaint, or any of them other than said Macco Construction Company, a corporation, the petitioner herein, entered into any agreement whereby said plaintiffs, or either of them, or any of their equipment, were or was employed to do any work whatsoever for any of said defendants other than said petitioning defendant; and that it is not true that said defendant Ben F. Wells at any time mentioned in said complaint was personally engaged in any construction work or had any interest in the work so being carried on by said petitioning de-

fendant or in the employment or in any contract, if any such there was, between said plaintiffs and said petitioning defendant, save and except that said defendant Ben F. Wells was at all times mentioned in said complaint an employee of said petitioning defendant and with respect to said plaintiffs acted solely in the course and scope of said employment; that attached hereto, marked Exhibit "A" and incorporated herein by reference as fully as if herein set forth at length, is an affidavit of said Ben F. Wells.

### IX.

That said petitioner is informed and believes and on such information and belief alleges that each and every defendant named in said complaint other than your petitioner is not a necessary or a proper party to this action and has no interest in the subject matter of this action, and has been fraudulently joined as a defendant in this action for the purpose of attempting to prevent a removal of this action to said United States District Court.

Wherefore, said petitioning defendant prays that said Superior Court proceed no further herein except to make an order of removal of said cause as required by law from said Superior Court to said United States District Court, and to accept and approve the said statutory bond in connection therewith which is herewith present- [8] ed to said Superior Court, and to direct a transcript of the record herein to be made and certified by the Clerk

of said Superior Court as provided by law, and your petitioner will ever pray.

MACCO CONSTRUCTION  
COMPANY,

By E. J. DAVIS

SCHELL & DELAMER,

By W. O. SCHELL

Attorneys for Petitioning  
Defendant. [9]

State of California,  
County of Los Angeles—ss.

E. J. Davis, being by me first duly sworn, deposes and says: that he is an officer, to-wit: Vice-President of Macco Constructing Company, a corporation, the petitioning defendant in the above entitled matter, and that affiant makes this verification for and on behalf of said corporation; that he has read the foregoing Petition for Removal to Federal Court and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon information or belief, and as to those matters that he believes the same to be true.

E. J. DAVIS

Subscribed and sworn to before me this 12th day of May, 1941.

[Seal]

MILDRED HUFFINE

Notary Public in and for the said County and State.

[Endorsed]: Filed May 15, 1941 (Superior Court). [10]

[Title of Superior Court and Cause.]

EXHIBIT A

State of California,

City and County of San Francisco—ss.

AFFIDAVIT OF BEN F. WELLS IN SUP-  
PORT OF PETITION FOR REMOVAL

Ben F. Wells, being first duly sworn, deposes and says:

That he is one of the defendants in the above entitled action, and was served with a copy of the summons and complaint therein on or about the 18th day of March, 1941; that he has caused his answer to be served and filed herein.

That at all times mentioned in the complaint herein affiant has been an employee of the defendant Macco Construction Company, a corporation, and was employed as the superintendent of that project in the City and County of San Francisco, State of California, known as the Bethlehem Steel Corporation contract; that affiant did not at any time mentioned in said complaint employ the plaintiffs above named, or either of them, or any of their equipment, to do any work whatsoever for affiant, and affiant denies that he was at such [11] time personally engaged in any construction work whatsoever. Furthermore, affiant alleges that he did not have any interest whatsoever in the grading and excavating project referred to in said complaint, which project, affiant is informed and believes and upon such information and belief alleges, is the same one which is hereinabove referred



to as the Bethlehem Steel Corporation contract, and affiant had no interest in the work being carried on in connection with said project or in the employment of or in any contract between said plaintiffs and said defendant Macco Construction Company, save and except in so far as affiant was such employee of said defendant Macco Construction Company, and affiant denies that he is indebted to said plaintiffs, or either of them, in the sum of \$6,700.00, or in any other sum, or at all.

That at the time your affiant discussed the matter of renting trucks from the plaintiffs, your affiant informed the plaintiffs that he was the Superintendent for Macco Construction Company, and that Macco Construction Company was the contractor on the work.

BEN F. WELLS

Subscribed and sworn to before me this 13 day of May, 1941.

[Seal]

RUTH NATUSCH

Notary Public in and for the County of San Francisco, State of California.

[Endorsed]: Filed May 15, 1941 (Superior Court). [12]

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[Title of Superior Court and Cause.]

BOND ON REMOVAL

Know All Men By These Presents, That Macco Construction Company, a corporation, as Principal, and the Fidelity and Deposit Company of Maryland, a corporation organized and existing

under and by virtue of the laws of the State of Maryland, and authorized to transact business under the laws of the State of California, as Surety, are held and firmly bound unto A. L. Farr and R. P. Sinclair, Plaintiffs in the above entitled action, their successors or assigns, in the sum of Five hundred and no/100 (\$500.00) Dollars, lawful money of the United States of America, for the payment of which well and truly to be made, we bind ourselves, our successors and assigns, as the case may be, jointly and severally, firmly by these presents.

The Condition of the Above Obligation Is Such, that

Whereas, Macco Construction Company, a corporation, one of the Defendants in the above entitled action, has applied, or is about to apply, by petition to the Superior Court of the State of California, in and for the City and County of San Francisco, for the removal of a certain cause therein pending wherein A. L. Farr and R. P. Sinclair are the Plaintiffs, and the Macco Construction Company, a corporation, Ben F. Wells, John Doe, Richard Roe, and Black and White Company, are the Defendants, to the District Court of the United States for the Northern District of California, Southern Division, for further proceedings on the ground in said petition set forth, and that all further proceedings in said action be stayed.

Now, Therefore, if the above named Macco Construction Company, a [13] corporation, Defendant,

shall within thirty (30) days from and after the date of the filing of said petition enter in said District Court of the United States for the Northern District of California, Southern Division, a duly certified copy of the record in the above entitled action, and shall pay, or cause to be paid, all costs that may be awarded therein by the said District Court of the United States, if such Court shall hold that such suit was wrongfully and improperly removed thereto, then this obligation to be void, otherwise to remain in full force and effect.

Dated this 12th day of May, 1941.

MACCO CONSTRUCTION  
COMPANY

By E. J. DAVIS

Vice President

FIDELITY AND DEPOSIT  
COMPANY OF MARYLAND

By W. M. WALKER

Attorney in Fact

Attest:

THERESA FITZGIBBONS  
Agent

State of California,  
County of Los Angeles—ss.

On this 12th day of May, A.D., 1941, before me, Mildred Huffine, a Notary Public in and for said County and State, personally appeared E. J. Davis, known to me to be the Vice President of the Macco Construction Company, the Corporation that executed the within Instrument, known to me to be

the persons who executed the within Instrument, on behalf of the Corporation herein named, and acknowledged to me that such Corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[Seal]                      MILDRED HUFFINE

Notary Public in and for said County and State.

State of California,  
County of Los Angeles—ss.

On this 12th day of May, 1941, before me, S. M. Smith, a Notary Public, in and for the said County of Los Angeles, State of California, residing therein, duly commissioned and sworn, peronally appeared W. M. Walker, known to me to be the Attorney-in-Fact, and Theresa Fitzgibbons, known to me to be the Agent of the Fidelity and Deposit Company of Maryland, the Corporation that executed the within instrument, and acknowledged to me that they subscribed the name of the Fidelity and Deposit Company of Maryland thereto and their own names as Attorney-in-Fact and Agent, respectively.

S. M. SMITH

Notary Public in and for the County of Los Angeles, State of California.

My Commission Expires Feb. 18, 1942.

[Endorsed]: Filed May 15, 1941 (Superior Court). [14]

[Title of Superior Court and Cause.]

NOTICE OF FILING PETITION FOR AND  
OF MOTION FOR ORDER OF REMOVAL

To the Plaintiffs Above Named and to Phillip Barnett, Esq., their attorney:

You and Each of You Will Please Take Notice that Macco Construction Company, a corporation, one of the defendants in the above entitled action, will forthwith after the time of service of this notice, move the above entitled Court in the Department of the Presiding Judge thereof, located in the City and County of San Francisco, State of California, for an order of said Court removing said action to the District Court of the United States for the Northern District of California, Southern Division, in accordance with the petition and bond therefor, which is herewith served upon you and which will herewith be filed in said court by said defendant.

Dated at Los Angeles, California, this 13 day of May, 1941.

SCHELL & DELAMER

By W. O. SCHELL

Attorneys for said Defendant

[Endorsed]: Filed May 15, 1941 (Superior Court). [15]

[Title of Superior Court and Cause.]

### ORDER FOR REMOVAL

The petition and bond for removal of the defendant, Macco Construction Company, a corporation, being duly presented to this court, and it appearing to the court that said petition for removal of said action to the District Court of the United States of America for the Northern District of California, Southern Division, has been duly filed and is in due form of law, and that said bond has been duly filed with good and sufficient sureties, as provided by law, and it appearing to the court that this is a proper cause for removal to said District Court, said petition and bond are hereby accepted and approved, and

It Is Hereby Ordered and Adjudged that this cause be and it is hereby removed to said United States District Court for the Northern District of California, Southern Division, and that the Clerk is hereby directed to make up and certify the record in said cause for transmission to said District Court forthwith.

Dated: May 15th, 1941.

FRANK T. DEASY

Judge.

Receipt of copy admitted this 15th day of May, 1941.

PHILLIP BARNETT

Attorney for Plaintiff.

[Endorsed]: Filed May 15, 1941 (Superior Court). [16]

In the United States District Court in and for the  
Northern District of California, Southern Division.

No. 21896 S

A. L. FARR, R. P. SINCLAIR,

Plaintiffs,

vs.

MACCO CONSTRUCTION COMPANY, a corporation,  
BEN F. WELLS, JOHN DOE, RICHARD ROE,  
BLACK AND WHITE COMPANY,

Defendants.

### NOTICE OF FILING RECORD

To the Plaintiffs Above Named and to Phillip Barnett, Esq., Attorney for Plaintiffs:

You and each of you will please take notice that on the 13th day of June, 1941, the certified record from the Superior Court of the State of California, in and for the City and County of San Francisco, was transferred and filed in the United States District Court, in and for the Northern District of California, Southern Division.

Dated: June 13th, 1941.

SHELL & DELAMER,

Attorneys for Defendants.

[Endorsed]: Filed Jun. 25, 1941. [17]

[Title of District Court and Cause.]

ANSWER OF DEFENDANT, MACCO CON-  
STRUCTION COMPANY, A CORPORA-  
TION

Comes now the defendant Macco Construction Company, a corporation, and answering plaintiffs' complaint, for itself alone and not for any of its co-defendants, admits, alleges and denies as follows:

I.

Alleges that it has not sufficient information or belief to enable it to answer the allegations of paragraph I of plaintiffs' complaint, and therefore, for the want of such information or belief, denies generally and specifically each and every allegation therein contained.

II.

Denies that this defendant at any time mentioned in plaintiffs' complaint was, or now is, a corporation organized or existing pursuant to the laws of the State of California, but on the contrary alleges that this answering defendant at all said times was, and now is, a corporation organized and existing under and by virtue of the laws of the State of Nevada, and is a resident of said State of Nevada.

III.

Answering paragraph III of plaintiffs' complaint, admits that on or about the 3rd day of December, 1940, this defendant and [18] the plaintiffs entered into an oral agreement in the City and



County of San Francisco, State of California, wherein and whereby the plaintiffs agreed to furnish four automobile trucks and the personal services of plaintiffs in the operation of the same, and that this defendant agreed to hire the personal services of the plaintiffs and said truck equipment, but denies that said agreement was for the hiring of said trucks or any truck, or said or any personal services, for the entire duration of that certain or any grading or excavating or other project of this answering defendant, or of any of the defendants, situated in the said City and County of San Francisco, or elsewhere or at all. On the contrary, this answering defendant alleges that said agreement was that the plaintiffs would furnish and maintain said four automobile trucks in good, safe, serviceable and workable condition, and the personal services of the plaintiffs in the operation thereof, for such time as this answering defendant should desire to avail itself thereof in connection with said grading and excavating project of this defendant in said City and County of San Francisco, and for no other or longer purpose or period of time.

Denies that relying upon the oral agreement alleged in plaintiffs' complaint, or pursuant thereto, or relying upon any agreement with this defendant, except as herein specifically alleged, the plaintiffs, or either of them, did purchase said number of automobile trucks, or any automobile truck, or that this answering defendant, or any of the defendants, did hire the use of said equipment, or any of it, or

the personal or any services of the plaintiffs, or either of them, for a period commencing on the 3rd day of December, 1940, or for any other period at all.

Alleges that, except as herein expressly admitted or denied, it has not sufficient information or belief to enable it to answer the allegations of said paragraph III and, therefore, for want of such information or belief, denies each and all of the remaining allegations thereof. [19]

#### IV.

Admits that on or about the 18th day of January, 1941, this answering defendant ceased to desire to avail itself of the use of said truck equipment, or any of it, or the services of the plaintiffs, or either of them, and thereupon terminated said agreement hereinbefore set forth.

Except as herein specifically admitted, denies generally and specifically each and every allegation of paragraph IV of plaintiffs' complaint.

#### V.

Admits that under and pursuant to the agreement hereinabove set forth this answering defendant agreed to pay to plaintiffs as and for compensation for their services and for the use of said truck equipment the sum of Two Dollars and Seventy Cents (\$2.70) per hour per truck, while said truck was in a condition to be operated and was being operated for the benefit of this defendant, and in addition thereto the sum of \$1.42851 per

hour on account of the payment of salary of the driver of each of said trucks for time during which said driver was on duty in connection with the business of this defendant, said sums, however, to be subject to deductions therefrom on account of amounts paid or expenses incurred by this defendant on account of personal liability and property damage insurance, workmen's compensation insurance, Federal Old age social security, gasoline and oil furnished by this defendant, the time of mechanics and cost of parts necessary for repairs to said trucks incurred by this defendant on behalf of plaintiffs, time during which the drivers of said trucks were not actually engaged in the business of performing services of this defendant due to the condition of said trucks, and other items of cost and expense reasonably incurred by this defendant on behalf of plaintiffs in connection with the operation of said truck equipment.

Alleges that the total number of working days upon said [20] project was fifty-five and one-sixth ( $55 \frac{1}{6}$ ) days, and no more, and that said trucks were operated for a total of seventeen (17) of such days, and no more, and that the plaintiffs or either of them did not render any personal services to this defendant under said agreement. Alleges that the services of said trucks and of the plaintiffs would not have been required on all of said remaining working days.

Except as herein specifically admitted or alleged, denies generally and specifically each and every allegation contained in paragraph V of plaintiffs' com-

plaint, or that the period contracted for between the plaintiffs and this defendant was or is approximately five (5) months, or any other period except as herein alleged, or that the difference between the cost of operation of the trucks referred to in plaintiffs' complaint and the contract price agreed upon between this defendant and the plaintiffs was approximately the sum of Sixteen Hundred Dollars (\$1,600.00), or any other sum, per month, or that by reason of any breach of contract by this defendant, or the or any termination of said agreement by this defendant, or for any other reason connected with said agreement or the work or services to be performed or rendered thereunder, or the cessation by the plaintiffs or either of them of performing said work or rendering said services on said 18th day of January, 1941, or at any other time or at all, the plaintiffs, or either of them, have been damaged in the sum of Six Thousand Four Hundred Dollars (\$6,400.00), or any other sum or at all.

## VI.

Alleges that it has not sufficient information or belief to enable it to answer the allegations of paragraph VI of plaintiffs' complaint, and therefore, for the want of such information or belief, denies generally and specifically each and every allegation therein contained. [21]

As a Second, Separate and Distinct Defense to Plaintiffs' Complaint, This Answering Defendant Alleges:

I.

This answering defendant hereby refers to, adopts and incorporates herein as fully as if herein set forth at length all the admissions, allegations and denials hereinbefore in this answer contained.

II.

Alleges that the automobile trucks and each of them furnished by the plaintiffs to this defendant were not in good or serviceable or workable condition, and that the plaintiffs did not maintain said trucks in good, safe, serviceable or workable condition, and that prior to the 18th day of January, 1941, certain of the drivers of said trucks refused to operate the same because of the condition of said trucks, and that plaintiffs and each of them did not render or offer to render to this defendant any personal services under said agreement, and that by reason of said matters and of each of them the plaintiffs and each of them themselves breached the said contract between the plaintiffs and this defendant prior to said 18th day of January, 1941, and that said breach of said contract by the plaintiffs continued to and including the said 18th day of January, 1941.

As a Third, Separate and Distinct Defense to Plaintiffs' Complaint, This Answering Defendant Alleges:

I.

This answering defendant hereby refers to, adopts and incorporates herein as fully as if herein set

forth at length all the admissions, allegations and denials contained in its first defense to plaintiffs' complaint.

## II.

Alleges that the automobile trucks and each of them furnished by the plaintiffs to this defendant were not in good, safe serv- [22] iceable or workable condition, and that the plaintiffs did not maintain said trucks in good, safe serviceable or workable condition, and that prior to the 18th day of January, 1941, certain of the drivers of said trucks refused to operate the same because of the condition of said trucks, and that the plaintiffs and each of them did not render or offer to render to this defendant any personal services under said agreement, and that by reason of said matters and each of them the consideration to this defendant for the entering into by it of said agreement with the plaintiffs failed in a material part.

As a Fourth, Separate and Distinct Defense to Plaintiffs' Complaint This Answering Defendant Alleges:

## I.

That the complaint nor any part nor paragraph thereof does not state facts sufficient to state a cause of action or to state a claim upon which relief can be granted against this answering defendant.

As a Fifth, Separate and Distinct Defense to Plaintiffs' Complaint, This Answering Defendant Alleges:

## I.

That it is informed and believes, and upon such information and belief alleges, that prior to the institution of this action the plaintiffs and each of them have assigned and transferred to Young & Sons Co., Ltd., a corporation, all of their right, title and interest in and to any recovery to which the plaintiffs or either of them might be entitled against this answering defendant by reason of any matters set forth in plaintiffs' complaint, and that said Young & Sons Co., Ltd., a corporation, at the time of the commencement of this action and at all times thereafter was and is the owner of all such right, title and interest of the plaintiffs and of each of them, and that the plaintiffs or either of them have not the legal capacity to maintain this action. [23]

Wherefore, this answering defendant prays for judgment against the plaintiffs and each of them that said plaintiffs and each of them take nothing by reason of their complaint, but that this answering defendant recover against the plaintiffs and each of them its costs of suit incurred herein, and for such other, further and different relief as to the Court may seem just in the premises.

SCHELL & DELAMER,

By GERALD F. H. DELAMER,

Attorneys for defendant  
Macco Construction Com-  
pany, a corporation.

United States of America,  
Southern District of California,  
Central Division—ss.

Fred H. Brown, being by me first duly sworn, deposes and says: that he is the Secretary-treasurer of Macco Construction Company, a corporation, answering defendant in the above entitled action; that he has read the foregoing Answer of defendant Macco Construction Company, a Corporation, and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

That affiant makes this verification for and on behalf of said defendant corporation.

FRED H. BROWN.

Subscribed and sworn to before me this 14th day of June, 1942.

[Seal] FLORENCE P. NELSON,  
Notary Public in and for the County of Los Angeles, State of California.

My Commission Expires May 20, 1942.  
(Receipt of Service.)

[Endorsed]: Filed June 17, 1941. [24]



[Title of District Court and Cause.]

NOTICE OF DEMAND FOR TRIAL BY JURY

To the Defendant, Macco Construction Company,  
and to Schell & Delamer, Its Attorneys:

Please Take Notice That the plaintiff above-named hereby demands a trial by jury of all of the issues presented by the pleadings in the above case.

PHILLIP BARNETT,  
Attorney for Plaintiffs.

Dated: June 16th, 1941.

[Endorsed]: Filed June 19, 1941. [25]

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[Title of District Court and Cause.]

MOTION TO DISMISS

Come now the defendants Macco Construction Company and Ben F. Wells, and move the Court for an order of dismissal of the above entitled action on the following grounds:

1. That the evidence fails to establish that a valid contract or any contract was entered into by and between the plaintiffs and said defendants or either of them.

2. That the evidence affirmatively shows that the plaintiffs had no capacity to contract or engage in the business of transportation of property for hire.

3. That the evidence fails to show that said defendants or either of them wrongfully breached any contract.

4. That the evidence fails to establish that plaintiffs [26] sustained any damages.

Respectfully submitted,

SCHELL & DELAMER.

By W. O. SCHELL,

Attorneys for Defendants,  
Macco Construction Com-  
pany and Ben F. Wells.

### MEMORANDUM OF AUTHORITIES

City Carriers Act—Act 5134 Deering's General Laws.

Entremount vs. Whitsel 13 Cal. 2d, Page 290.

Georgia Truck System, Inc. vs. Interstate Commerce Commission, Circuit Court of Appeals, Fifth Circuit, 123 Fed. 2d, page 210.

Industrial Development & Land Company vs. Goldsmith 56 Cal. App. 507. Duntley vs. Tutt 48 A.C.A. 414.

[Endorsed]: Filed Mar. 6, 1942. [27]

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District Court of the United States, Northern  
District of California, Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Friday, the 6th day of March, in the year of our Lord, one thousand nine hundred and forty-two.

Present: the Honorable James Alger Fee, District Judge.

No. 21896-S—Civil

[Title of Cause.]

The parties hereto and the jury impaneled herein being present as heretofore, the trial hereof was thereupon resumed. Robert Sinclair and Frank Young were recalled and testified on behalf of the plaintiffs. Mr. Barnett introduced in evidence and filed plaintiffs' exhibits Nos. 4 and 5, and plaintiffs rested. Mr. Schell made a motion to dismiss, which said motion was Ordered denied. J. R. Gerhart, Fred Crawford, Louis Meinn, Oscar Carlson, John Keenan, Arthur Birch, and O. H. Tucker were each sworn and testified on behalf of the defendants. Mr. Schell introduced in evidence and filed defendants' exhibit "A". Mr. Schell read in evidence the deposition of Ben F. Wells, and the defendants rested. Robert Sinclair was recalled and testified on behalf of the plaintiffs, and both sides rested. It Is Ordered that the further trial hereof be continued to March 7, 1942, at 10:00 A. M., and the jury, after being duly admonished by the Court, was excused until that time. [28]

[Title of District Court and Cause.]

REPORTER'S TRANSCRIPT

Thursday, March 5, 1942.

Counsel Appearing:

For the Plaintiffs:

Phillip Barnett, Esq.

For the Defendants:

W. O. Schell, Esq.

For the Intervenor:

J. W. O'Neill, Esq.

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(A jury was duly impaneled and sworn and opening statements made by respective counsel.)

Mr. Barnett: Your Honor, I would like to read into evidence the deposition of A. F. McLane, who is the district engineer in charge of the Bethlehem Steel Company, and the man who had charge of this particular work on behalf of the Bethlehem Steel Company. This deposition, your Honor, was taken on Friday, September 12, 1941, and there were present Mr. Schell, representing the defendant, and myself representing the plain- [31] tiffs.

DEPOSITION OF A. F. McLANE

“Direct Examination

“Mr. Barnett: Q. Mr. McLane, will you state your business, please?

(Deposition of A. F. McLane.)

“A. I am known as District Engineer of the Bethlehem Steel Company.

“Q. Where do you reside at the present time?

“A. 2709 Dwight Way, Berkeley.

“Q. In the course of your business, Mr. McLane, are you sent to different parts of the country?       A. Yes.

“Q. And do you expect to be in San Francisco within the next two or three months?

“A. No.

“Q. Directing your attention to December of last year, were you in the yard of the Bethlehem Shipbuilding Company?

“A. Yes.

“Q. That is here in San Francisco?

“A. Yes.

“Q. Did you have anything to do with the contract, the contemplated contract for the removal of the approximately 600 thousand cubic yards of dirt from the Bethlehem yard, or property adjacent thereto?

“A. Yes.

“Q. And in what connection were you identified with that?

“A. In an advisory capacity during the taking of bids for the removal of the hill.

“Q. And where was the hill located?

“A. It was located along the westerly side of the so-called Risdon property.

(Deposition of A. F. McLane.)

“Q. You said you had something to do with the bids. Could you state approximately how much dirt was to be removed?

“A. Yes, we conditionally agreed that it was 615 thousand cubic yards.

“Q. Was there any condition in reference to the time within which that was to be removed?” [32]

Mr. Schell: Just a moment. To which we at this time wish to object as incompetent, irrelevant and immaterial, and it has no bearing on the issues here and not the best evidence. If there was a written contract that would be the best evidence.

The Court: Let me see the answer.

Mr. Barnett: It is line 20.

The Court: Well, looking at the deposition, do you see any reason why those answers should not go in now?

Mr. Schell: I don't think the entire deposition is material so far as that is concerned, in this particular litigation.

The Court: Well, it is simply, as I understand, preliminary to an attempt to develop one feature of the case.

Mr. Schell: Well, I will withdraw the objection, your Honor.

The Court: That issue, I take it, you would stipulate, anyhow.

Mr. Schell: Yes.

(Deposition of A. F. McLane.)

Mr. Barnett: (Reading) "Q. Can you give us any information on that subject, Mr. McLane?

"A. I can tell you the stipulated date for completion.

"Q. Would you do that?

"A. Which was April 8; that was stipulated in the contract.

"Q. When was the work to start?

"A. I can't answer that definitely, although I can tell you when it did start.

"Q. Would you do so, please?

"A. (Referring to a diary).

"Q. You are now referring to a——

"A. Diary.

"Q. That is your own diary, is it?

"A. That is my diary, yes. I have an entry of November 30—'Macco started [33] work'; and then on December 9—'Macco really started with one shovel,' and by that I think I mean that some of the boys were on the job on November 30, doing preliminary studying of the project.

"Q. At that time had a contract been let to the Macco people?

"A. They had no written contract then.

"Q. Can you state how it came about that they were on the ground at that time?

"A. As I recall it, we had a verbal contract, pending the actual writing of one, and asked them to start work.

(Deposition of A. F. McLane.)

“Q. Subsequently, a written contract was entered into, is that right? A. Yes.

“Q. But at that time, in November, that these men were there, it was agreed and understood by Macco, we well”—that is an error, your Honor, but I will read it as it appears. “—we well as yourself, that they had the contract? A. Yes.

“Q. Now, you stated that the work was completed on April the 16th?

“A. Yes. I have an entry in my diary, and you are welcome to introduce that letter which I gave you, which is correspondence between myself and Lieutenant Elliott, stating that the last work was done on April 16.”

The Court: Well, that is stricken. That is certainly hearsay.

Mr. Barnett: There is no objection to that, your Honor. Page 5, line 5:

“Q. Will you state how many working days were given to the Macco people to complete this job?”

Mr. Schell: That is objected to as immaterial.

The Court: Objection sustained.

Mr. Barnett: (Reading) “Mr. Barnett:

Q. The question [34] now is, how many working days were given?”

Mr. Schell: Same objection.

The Court: Same ruling.



Mr. Barnett: May it be stipulated, then, in the spirit of time, your Honor, that contract No. R-100, which is the contract referred to and consisting of a lot of small printed matter has in paragraph Second of its provisions the following provision, and I offer this as an offer of proof——

Mr. Schell: May I approach, your Honor. I loaned you our copy of the contract, and I haven't seen it since.

Mr. Barnett: Well, I haven't got your contract, but I have a typewritten copy of the contract. I see it is attached to the deposition, your Honor. There is a copy of it, and I am now referring to the date at which the work was to start and the date upon which it was to be completed.

The Court: Well, I don't see any purpose in reading the provision if counsel can agree as to the date when it was supposed to be completed and the date when it was completed and the working time. If counsel wishes to stipulate——

Mr. Schell: Well, I am perfectly willing to stipulate the actual work started on December 9th, and was finished——

Mr. Barnett: Well, that is not the point. His Honor suggested that the time of performance as shown by the contract, that is what *we interested* in, the date so far as the contract is concerned, because there seems to be some difficulty as to the interpretation of the time when it started.

The Court: Ladies and gentlemen, I think we

will save time if I let you go at the present time. I will give you a recess now until 2 o'clock this afternoon. During the time you are absent from the Court you will observe the instructions [35] the Court has already given you, and will not discuss the matter among yourselves or with other persons, or remain in the presence of other persons who may be discussing this case. You may now retire, ladies and gentlemen, and return here at 2 o'clock.

(The jury then retired, and after further discussion between the Court and respective counsel a recess was taken until 2 o'clock of the same day.) [36]

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Thursday, March 5th, 1942, 2 o'clock P. M.

The Court: You may proceed.

Mr. Barnett: Your Honor, we have entered into a stipulation to the effect that the remainder of the deposition of A. F. McLane will not be read, but it may be stipulated that under the contract by which this work was to be performed, the work was, according to the contract, to start on November 16th, and be completed on or before April 8th; and, as a matter of fact, work was completed on April 16th.

We offer in evidence at this time, your Honor, the contract, R-100, as plaintiffs' first exhibit.

Mr. Schell: Just a moment. We are taking the stipulation. First, we will accept the stipulation,

but I don't quite see the materiality of the contract, cluttering up the record.

The Court: I think that this is sufficient, unless there is some purpose to it. I don't see that there is. I think the stipulation covers it. The objection is sustained.

Mr. Barnett: We make the offer for the purpose of the record, your Honor.

Mr. O'Neill, please.

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J. W. O'NEILL,

Called for the Plaintiffs; Sworn.

The Clerk: Will you state your name to the Court and jury?      A. J. W. O'Neill.

Mr. Barnett: Q. What is your address, Mr. O'Neill?

A. 1101 Central Bank Building, Oakland.

Q. Mr. O'Neill, what is your business or profession, please?      A. I am an attorney. [37]

Q. How long have you been practicing your profession?      A. 27 years.

Q. Where are your offices located?

A. Oakland, California.

Q. Am I correct in stating that you are the attorney for Young & Sons?

A. That is correct.

Q. What is their business, please?

A. Well, I presume you would call them construction contractors.

Q. Do they deal in automobile trucks?

(Testimony of J. W. O'Neill.)

A. Not as dealers, no.

Q. Well, what I am getting at, in November of 1940, am I correct in saying that they had for sale these four trucks subsequently purchased by Farr & Sinclair? A. That is correct.

Q. At that time, Mr. O'Neill, were you their attorney? A. I was.

Q. Did you have anything to do with the preparation of the contract for the sale of these trucks to Farr and Sinclair?

A. Yes, I prepared the contract.

Q. Did you on or about that date, or sometime close thereto, have a conversation with anyone connected with the Macco Construction Company?

A. I did.

Q. With whom did you have that conversation?

A. Mr. Wells.

Q. Would you state to the Court and jury, please, the circumstances leading up to that conversation?

A. If your Honor please, I assume that I am to leave out hearsay conversations?

The Court: I should suggest so, yes, sir.

A. It may be a little difficult to state the circumstances without bringing in some possible hearsay. I might state it this way, that the matter first came to my attention when Mr. Young, president of Young & Sons Company, and Mr. Farr and Mr. Sinclair came to my office to discuss the terms of a proposed contract. [38] Those terms were pre-

(Testimony of J. W. O'Neill.)

pared—the contract was prepared by me. There was also prepared a letter to be signed by Farr and Sinclair, and addressed to Macco Construction Company. That letter was signed by Farr and Sinclair, and the letter together with, I believe, two copies of the proposed contract of purchase and sale of the trucks were delivered to Farr and Sinclair. At the end of the contracts was typed a form of guaranty, which supposedly was to be signed by Macco Construction Company, and a day or two later there was another meeting with Mr. Young and Mr. Sinclair and Mr. Farr——

Mr. Barnett: Q. May I interrupt there. Have you in your possession a contract on the form of guaranty that you just referred to?

A. I do not have in my possession the form of the original contract that I referred to.

Q. Have you a copy of it?

A. I have no copy of it.

Q. I show you what purports to be a copy of a conditional sales contract, which, I believe, you furnished my office with, and I ask you whether or not you recognize that?

The Court: Just a moment. Stay right where you are, counsel.

Mr. Barnett: Pardon me.

Q. Do you recognize that as a copy of the contract you just referred to?

A. This is not the copy of the contract that was first drawn up, Mr. Barnett.

(Testimony of J. W. O'Neill.)

Q. What is the instrument that has been handed to you?

A. The instrument that has been handed to me is a copy of the second or final contract.

Q. I see.

A. I might state, however, that the only difference between the two contracts, the original draft and the second draft was as to the purchase price and as to the amount [39] of the monthly payments.

Q. Well, then, am I correct in saying, Mr. O'Neill, that we may discount the first contract as being in the stage of negotiation as to the ultimate price agreed upon, is that correct?

A. I don't just get the meaning of your question. I will say this, the first contract was not entered into.

Q. Yes.           A. That was discarded.

Q. Now, I hand you here a copy of what purports to be a type of guaranty, and I ask you if you recognize that copy?           A. I do.

Q. Of those two documents you have in your hand now, the first one is the contract that was ultimately signed, and the second is the guaranty that you mentioned a moment ago?

A. Yes. Now, this document you refer to as the guaranty is a copy of the guaranty that was typed at the end of the first agreement, the one that was to be taken over by Farr and Sinclair to the Macco Construction Company.

(Testimony of J. W. O'Neill.)

Mr. Barnett: Your Honor, we offer as Plaintiffs' Exhibit No. 1 the contract that counsel has, and second, as the next exhibit in order, the guaranty referred to.

Mr. Schell: We object to that. I don't see the materiality of it.

Mr. Barnett: It is preliminary, your Honor.

Mr. Schell: It is not binding on the Macco Construction Company. There was no showing they even saw the contracts.

Mr. Barnett: I take it there is no objection to the contract itself, that is, the purchase of the equipment, is that correct, counsel?

The Court: Its objection is presently sustained. I don't know whether there is any connection with the defendant with [40] these contracts at all.

Mr. Barnett: It is preliminary.

The Court: It may be, but I sustained the objection.

Mr. Barnett: Well, I will offer the contract as plaintiff's exhibit for identification next in order.

The Court: I won't prevent you from having it marked, that is true.

Mr. Barnett: Yes, your Honor, and the form of guaranty I offer as plaintiffs' next exhibit for identification.

(Conditional sale contract marked "Plaintiffs' Exhibit No. 1 for identification;" and form of guaranty marked "Plaintiffs' Exhibit No. 2 for identification.")

(Testimony of J. W. O'Neill.)

Mr. Barnett: Q. Would you continue from there, Mr. O'Neill, with particular reference to any conversation that you might have had with Mr. Wells or any agent of the Macco Construction Company?

Mr. Schell: Now, just a minute. I object to that question, to the form of the question, because that would call for the conclusion and opinion of the witness as to who might be an agent of the Macco Construction Company.

The Court: Well, tell whom you had the conversation with. That is the first thing.

A. I will state this. The only person connected with the Macco Construction Company with whom I have had any conversation was Mr. Ben F. Wells, who designated himself the general superintendent.

Mr. Barnett: Q. Go ahead from that.

A. That conversation was over the telephone. I can't give you the exact date, but it was between the 1st and the 4th of December of 1940. The conversation which I had with Mr. Wells was substantially [41] as follows: I told Mr. Wells that negotiations were being completed between Farr and Sinclair for the purchase by them under a conditional sale contract from my client, Young & Sons Company of four auto trucks, and that Farr and Sinclair wished to get those trucks under a conditional sale contract with no money being paid down. I said that "Farr and Sinclair have advised me that you refused to guarantee the pay-



(Testimony of J. W. O'Neill.)

ments, or to sign the guaranty which I prepared.” He said, “Yes, we would not guarantee anything under those contracts.” I said, “Well, the thing that Mr. Young wants to find out for sure is whether or not you would be willing to accept an assignment by Farr and Sinclair of the moneys that would become due them from Macco Construction Company, up to the sum of \$875.00 a month.” I advised him that the contract, the proposed contract, would call for payments of \$3500.00, payable \$875.00 per month for four months.” “Well,” he say, “we would be willing to accept an assignment, but we will not guarantee anything, and I want it distinctly understood that we will only oblige ourselves to pay to your client under the assignment any moneys that may become due to Farr and Sinclair.” I told him, “Well, that was all they wanted him to assure us that he would do.” And I said, “Another thing, Mr. Young wants to know for sure that you have arranged a contract with Farr and Sinclair for using those trucks on the hauling job at the Bethlehem plant.” He says, “Yes, and we have had those arrangements made.”

Q. Subsequently——

A. (Continuing) So I then prepared, following that conversation, and assignment, a form of acceptance of the assignment. I have the original of that here. That is one of the originals.

Q. Would you produce it, please?

A. It is attached to an [42] original of the conditional sale contract itself.

(Testimony of J. W. O'Neill.)

Mr. Barnett: We offer, your Honor, in evidence the assignment and copy of the conditional sale contract as plaintiffs' next exhibit. I desire to read the assignment to the jury at this time. (Reading)

“Assignment.

“For a Valuable Consideration, the receipt whereof is hereby acknowledged, we do hereby assign, transfer and set over unto Young & Sons Co., Ltd., a corporation, 599 Colusa Avenue, Berkeley, California, \$7,500.00 of the first moneys to become due and payable to us from Macco Construction Company under our contract with said Macco Construction Company upon the hauling job at the Bethlehem Steel Corporation property, said sum of \$7,500.00 to be paid in installments of at least \$875.00 per month on or before the 4th day of each month, commencing January 4, 1941, and we do hereby authorize and request said Macco Construction Company to pay said moneys to said Young & Son Co., Ltd., a corporation, and acknowledge and agree that such payments, when so made, shall operate as a full acquittance to said Macco Construction Company of its said obligations to us to the extent of the payments made in accordance with this assignment.

“In Witness Whereof we have hereunto set our hands this 3rd day of December, 1940.

A. L. FARR

R. P. SINCLAIR

(Testimony of J. W. O'Neill.)

“We Hereby Accept the foregoing assignment and agree to make the payments at the times and in the amounts specified in said assignment. It Is Distinctly Understood and Agreed, however, that we are obligated to make said payments only out of [43] moneys to become due and payable from us to said A. L. Farr and Robert P. Sinclair, and not otherwise, and that if sufficient moneys do not become due and payable to said A. L. Farr and Robert P. Sinclair to make said payments, we shall be obligated to make payments only to the extent of the moneys actually due and payable from us to said A. L. Farr and Robert P. Sinclair.

“In Witness Whereof the undersigned has caused these presents to be executed by its officer thereunto duly authorized.

“MACCO CONSTRUCTION  
COMPANY

“By BEN F. WELLS,  
General Superintendent,”

I think that stands for.

May I have the assignment and conditional sale contract marked as plaintiffs' exhibit next in order?

The Court: Yes, they are admitted in evidence.

(Assignment and conditional sale contract marked “Plaintiffs' Exhibit No. 3.”)

Mr. Barnett: Q. Do you know of your own knowledge whether *or Young & Son* have received any money under that assignment?

(Testimony of J. W. O'Neill.)

A. I don't know. There is none received as far as I know. I can only put it that way.

Mr. Barnett: That is all.

### Cross Examination

Mr. Schell: Q. Mr. O'Neill, in your conversation with Mr. Wells over the telephone he told you that he wanted it distinctly understood that they were not guaranteeing any of the payments, and that the only obligation that they would be willing to undertake would be to honor an assignment as to such moneys that were determined? [44]

A. That is correct.

Q. You prepared that acceptance of the assignment, did you not? A. I did.

Q. That is why you put that wording in there?

A. That is correct.

Q. In your conversation with Mr. Wells there was no mention of any specific time at which these people would work, was there?

A. I can't recall any specific time being mentioned, Mr. Schell. The only thing that I can recall discussing on that subject was that Mr. Wells verified to me the fact that they had made a contract with Farr and Sinclair, and that those trucks, if sold to them, would be used on that job; but I don't recall any specific time being mentioned.

Q. In other words, so far as the conversation with Mr. Wells was concerned, you wouldn't know whether it was a day, or two days, or a month, or a year that was mentioned?

(Testimony of J. W. O'Neill.)

A. I can't recall any discussion of a definite time.

Mr. Schell: That is all.

Redirect Examination

Mr. Barnett: Q. Mr. O'Neill, was anything said as to the payments of \$875.00 for a period of four months, which payments were to be made on the 1st day of each and every month, commencing in January?

A. Oh, yes, that part was discussed; in fact, I state to Mr. Wells, I believe, as I testified before, that Mr. Young wouldn't want to let these trucks go out without a down payment, unless he felt sure that he was going to get the \$875.00 for the four months specified in the contract.

Mr. Barnett: That is all. [45]

Mr. Schell: That is all.

Mr. Barnett: Mr. Young, please.

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FRANK YOUNG,

Called for the Plaintiffs; sworn.

The Clerk: Will you state your name to the Court and jury. A. Frank Young.

Mr. Barnett: Q. Mr. Young, you are identified with the firm of Young & Sons, is that correct?

A. Yes.

Q. You were the owner of these trucks we are concerned with? A. Yes, sir.

(Testimony of Frank Young.)

Q. Do you recall on what day they were delivered to Mr. Farr and Mr. Sinclair, approximately?

A. Well, it was probably along about the 25th of November, or something like that—yes, about November, 1940.

Mr. Schell: I beg your pardon? Did you say the 25th? A. Of November, yes.

Mr. Barnett: Q. Has your firm, or have you yourself, as far as you know of, received any payment on account of the assignment referred to?

A. We haven't received any payments.

Mr. Barnett: That's all.

The Court: Just a moment.

Mr. Schell: That's all.

Mr. Barnett: Mr. Farr, please.

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A. L. FARR

Called for the Plaintiffs; sworn.

The Clerk: Will you state your name to the Court and jury. A. A. L. Farr. [46]

Mr. Barnett: Q. Mr. Farr, in November of 1940, what was your business?

A. I wasn't doing anything at the time.

Q. Are you one of the plaintiffs here?

A. Yes, sir.

Q. Do you recall the circumstances under which you went to work on the Bethlehem Steel job?

A. Yes, sir.

(Testimony of A. L. Farr.)

Q. Would you state to the Court and to the jury, please, when you first heard about that job?

Mr. Schell: I don't see the materiality of that, and I object to the question on that ground.

Mr. Barnett: It is preliminary.

The Court: Yes, he may answer.

A. I just heard of it by an individual by the name of Mr. Strand. We contacted the Bethlehem Company, a Mr. Dalston and he informed us that Macco had the contract for it, and that Mr. Wells from Macco Construction Company was not there at the time. We contacted him at the Palace Hotel. He said he was very busy that day, but he would be glad to see us the next day in regard to hiring any equipment for the Bethlehem Steel Company job.

Mr. Barnett: Q. Did you see him the next day?

A. Yes, I saw him the next evening.

Q. Where did you see him and who was present?

A. I saw him at the Palace Hotel—Mr. Sinclair, myself and Mr. Wells.

Q. You were referring to the equipment?

A. Yes, we did.

Q. Will you state to his Honor and to the jury the substance of that conversation, as you remember it?

A. Mr. *Well* asked what make, type and so forth the equipment was. We explained they were four Autocar trucks that we had in mind purchasing for the job. They were seven yard capacity, and

(Testimony of A. L. Farr.)

would handle eight yards; that they were in good condition, [47] had Heil hoists, and that is about all I remember.

Q. Did you discuss the terms under which you were to let them have these trucks?

A. Yes, sir.

Q. What were the terms, please?

A. Railroad Commission rates.

Mr. Schell: We object to the form of that question as calling for the conclusion of the witness.

The Court: State what was said.

A. Railroad Commission rates, \$2.70 an hour.

Q. Who said that? A. Mr. Wells.

Mr. Barnett: Q. Was anything said by Mr. Wells with reference to payment of drivers, insurance and so forth?

A. Yes, sir, he said that his firm would take care of the drivers' payroll as well as the insurance; that is, the compensation insurance.

Q. Directing your attention to the language of the contract, at the time you were going to work will you state what the conversation was in that regard, please?

A. He said——. We asked him how long the job would last, and he said four months, 120 working days.

Q. Was anything further said in reference to your employment by the Macco people?

A. Nothing other than he said the equipment sounded interesting, and we would be welcome to



(Testimony of A. L. Farr.)

go to work for them on another job after the Bethlehem Steel job was over.

Q. When do you recall that this conversation took place? A. The last part of November.

Q. Subsequent to that time did you have any further conversation with Mr. Wells?

A. Yes, several days after.

Q. What did the conversation deal with? [48]

A. He said he was not definitely sure how many trucks he would hire, because he didn't know as to his own equipment, whether it would be in San Francisco or San Diego. He said to contact him three or four days later.

Q. Was this prior to the time that he signed Plaintiffs' Exhibit 3, the assignment?

A. Yes, sir.

Q. Subsequently, after these various conversations, you produced Plaintiffs' Exhibit 3 for his signature, is that correct? A. Yes, sir.

Q. And did he return it? A. Yes, sir.

Q. Did he return the amounts, that is, the \$875.00 a month? A. Yes, sir.

Q. For a period of four months?

A. Yes, sir.

Q. And it was signed subsequently by him, is that correct? A. Yes, sir.

Q. Did you subsequently return that to Mr. Young or to Mr. O'Neill?

A. Mr. O'Neill it was.

Q. How long have you been in the trucking business? A. I was raised in it.

(Testimony of A. L. Farr.)

Q. How old a man are you, plesae? A. 31.

Q. Was your father in it before you?

A. Yes, sir.

Q. Do you specialize in any particular branch of the trucking business?

A. The last several years it has been mostly construction.

Q. In the last several years you say it has been mostly construction work? A. Yes.

Q. In reference to the trucks themselves, are you familiar with the maintenance of and the various quality of trucks? A. Yes, sir.

Q. Do you work on them?

A. Yes, sir. [49]

Q. Are you a mechanic? A. Not by trade.

Q. You know something about trucks, don't you? A. Yes, sir.

Q. Can you operate them? A. Yes, sir.

Q. Can you state to his Honor and to the jury the condition of the trucks that you purchased?

A. I didn't hear that.

Q. What condition were the trucks in?

A. They were in good condition.

Q. Did you drive over to the Bethlehem job?

A. Yes, sir.

Q. When did they actually go to work?

A. December 9th.

Q. When did you receive delivery, if you recall?

A. About December 5th, approximately. That may be a day or so off.

(Testimony of A. L. Farr.)

Q. Did you do any work on the trucks in between that time?      A. Yes, I worked on them.

Q. What work, please?

A. It was mostly minor repairs, such as ignition, wiring, generators, gaskets, carburetion and other minor things like that.

Q. How many hours a day were those trucks on the job?

A. They were on all the time, 24 hours a day.

Q. For how long a period of time?

A. They were there from the first part of December until January 18th.

Q. During that time did you devote your services to the work?      A. Yes, sir.

Q. How many hours a day did you put it?

A. At least 12, and sometimes 24.

Q. Were you there with Mr. Sinclair?

A. Yes, sir.

Q. There was always one of you there, is that right?      A. That is correct.

Q. Have you received any money from the Macco Construction [50] Company for the work that you performed?      A. No, sir.

Q. Have you received any money from the Macco Construction Company for the work that the trucks did?      A. No.

Q. Nothing has been paid to you at all?

A. Nothing at all.

Q. When was the first time you were informed that your services were no longer required, and

(Testimony of A. L. Farr.)

when I say "services" I mean the services of the trucks as well?      A. On January 18th.

Q. What were the circumstances, please?

A. Mr. Sinclair told me——

Q. Just a minute. You had no conversation with any representative of the Macco people, is that true?      A. Not before then.

Q. Is it also true that Mr. Sinclair took care of the figures of the partnership?

A. All the figures?

Q. The mathematics connected with the books and so forth?      A. Yes.

Q. Is it also true you devoted your time to the maintenance of the trucks themselves, is that correct?      A. Yes, sir.

Mr. Barnett: That's all.

#### Cross Examination

Mr. Schell: Q. Mr. Farr, you say you have been in the trucking business how long?

A. Ever since I can remember.

Q. Not knowing how good your memory is, what would you say that was in years?

A. Well, my father started in long before I was born.

Q. I didn't ask you about your father. How long have you been in the trucking business?

A. Actually in business myself, starting at the legal age, say, 21. [51]

Q. What were you doing in connection with the trucking business during the year 1940?

(Testimony of A. L. Farr.)

A. I was driving for Mr. Sinclair.

Q. You were a driver in the employ of Mr. Sinclair?      A. Yes, sir.

Q. Did that go right up until the first part of December, 1940?

A. No, Mr. Sinclair sold out. I drove for his partner whom he sold out to for a while after that.

Q. What had you been doing during the month of November, at that time?

A. We were negotiating this arrangement.

Q. During the month of November?

A. Yes, sir.

Q. Had you ever been in the trucking business yourself, that is, outside of a truck driver?

A. Yes, sir.

Q. When and where?

A. Fargo, North Dakota, from—I took over ownership on the death of my father on the 30th of June, 1932.

Q. When did these particular trucks first start working over there on the Bethlehem job?

A. The 9th of December.

Q. Did all your trucks work that day?

A. Yes, I believe they did.

Q. Isn't it a fact that those trucks were numbered 11, 22, 33 and 44?      A. Yes, sir.

Q. As a matter of fact, No. 44 didn't work at all that day, did it?

A. I don't recall offhand.

Q. You say that you devoted from 12 to 24

(Testimony of A. L. Farr.)

hours a day in the operation of this trucking business, is that correct?      A. Yes, sir.

Q. You weren't on the payroll of Macco, were you?      A. No.

Q. You were engaged in your own business of operating this trucking business, is that right?

A. Yes, sir.

Q. Mr. Sinclair was not an employee of Macco, was he?      A. No. [52]

Q. Was he engaged also in the operating of this trucking business?      A. Yes.

Q. How much time did he spend around there?

A. About the same time.

Q. 12 to 24 hours a day?      A. Yes, sir.

Q. What did you do during those 12 to 24 hours a day?

A. That covers a lot of territory. We were busy adjusting equipment, taking care of it, watching it, watching the drivers.

Q. Did the trucks work on the 10th of December, any of them?      A. I don't know that.

Q. Did you keep any records of when these trucks operated, and when they didn't operate?

A. I didn't personally.

Q. Did Mr. Sinclair, as far as you know, keep records of that?      A. Yes.

Q. Of the hours that the trucks operated, the individual trucks and so forth?

A. I believe he did, yes.

(Testimony of A. L. Farr.)

Q. So far as you know, that record is available in the firm of Farr and Sinclair, is that right?

A. As far as I know.

Q. Isn't it a fact, Mr. Farr, that on the 9th day of December, there were only three trucks—I am talking now about those four trucks, these Auto-cars—that were in operation. And further, none of them were able to work a full day that day?

A. No, that isn't right.

Q. Isn't it a fact that when the trucks were trying to operate that first day, that you had gas-kets blow out and water hoses go bad and ignition trouble?

A. We had some, yes.

Q. Isn't it a fact——. Well, withdraw that.

Q. Do you know Mr. Burch? A. Yes, sir.

Q. He was the foreman around that place, was he not? A. Yes, sir. [53]

Q. Macco? A. Yes, sir.

Q. Do you remember having a conversation with Mr. Burch on the 9th day of December, in which he told you that the trucks were in such terrible condition that he couldn't let you work?

A. Not that kind of a conversation.

Q. Did he say that to you in substance or effect at that time? A. I don't recall that.

Q. And isn't it a fact that you told him that you would do some work on the trucks, that the trucks had been standing around for several years, and everything had dried out, and you were going to do some work on them, and he said something to

(Testimony of A. L. Farr.)

the effect, "Well, you better, if you want to work around here"? A. No.

Q. Isn't it a fact that about two days later he told you your trucks were in such bad condition that you were all through on that job?

A. Mr. Burch didn't say that.

Q. Isn't it a fact that you then asked him if you fixed the trucks and got them back in good shape could you go back to work?

A. All that was with Mr. Wells.

Q. Mr. Wells told you——. You had that kind of a conversation with Mr. Wells, did you?

A. Not that kind of a conversation, no, sir.

Q. I am asking you if you had a conversation like that with Mr. Burch? A. No, sir.

Q. Isn't it a fact that when you asked him if you could go back on the job, put the trucks back to work, he said that he would have to see Mr. Wells about it? A. No, sir.

Q. December 9th, the day when the job started, was a Monday, was it not?

A. I don't recall.

Q. With the exception of whatever work those trucks did on that [54] date, no more work was done by those trucks until the following morning?

A. I don't remember.

Q. It was about the end of that first week when Mr. Burch said, "If your trucks are all in working condition, you can try again," or words to that effect? A. No.



(Testimony of A. L. Farr.)

Q. Did you keep a record of the percentage of time that your trucks were in operation?

A. Mrs. Sinclair kept those records.

Q. Did you have considerable brake trouble with those trucks?      A. No, sir.

Q. Did you reline the brakes at any time?

A. Yes, sir.

Q. Did you do mechanical work on these trucks?

A. Some.

Q. And you supervised the drivers?

A. Yes, sir.

Q. Gave them instructions?      A. No, sir.

Q. What did you do in the way of supervising? You said you were busy supervising and watching the drivers? What did you do in that regard?

A. Checking on them as to their capabilities.

Q. And if you found they weren't capable, what would you do?      A. Fire them.

Q. You fired them. How many did you fire because they were not capable?

A. I don't recall the exact number.

Q. Approximately?

A. I couldn't give you that definitely.

Q. Was it more than one?      A. Yes.

Q. More than five?      A. No.

Q. Less than five?

A. Somewhere around five.

Q. Somewhere around five. How many drivers did you hire for that job?

A. It varied considerably, depending on the

(Testimony of A. L. Farr.)

number of trucks Macco would let us run during the shift.

Q. You furnished all the gasoline and everything for the operation of those trucks?

A. No, but it was deducted from [55] our earnings.

Q. Now, you had considerable trouble, didn't you, all during the time you were on this job and keeping those trucks operating? A. No, sir.

Q. Did those trucks have cabs on them?

A. Three of them did.

Q. What kind of cabs? A. Open.

Q. Open cabs. What do you mean by an open cab? A. Without doors.

Q. What? A. Without doors.

Q. Were they equipped with lights?

A. Yes, sir.

Q. What kind of lights?

A. I don't recall the name.

Q. Do you remember having a conversation with Mr. Tucker? Do you know Mr. Tucker?

A. Yes, I know Mr. Tucker.

Q. He was an employee of Macco's, wasn't he?

A. Yes, sir.

Q. Manager and assistant superintendent?

A. Yes, sir.

Q. You would see Mr. Tucker from time to time on the job, would you? A. Yes, sir.

Q. Do you remember an occasion approximately a week before January 18th, 1941, when you met

(Testimony of A. L. Farr.)

Mr. Tucker at the entrance to that little office they have there in the Bethlehem yards?

A. I don't recall meeting Mr. Tucker there, do you mean?

Q. What?

A. I don't recall definitely meeting him any particular place.

Q. Do you recall a conversation you had with Mr. Tucker when you met him in the office, say, around about the 10th or 11th or 12th of January, along in there, and you asked Mr. Tucker, "How much longer will I be around here?"

A. I don't recall that.

Q. Can you recall whether there was such a conversation or not?      A. No, sir. [56]

Q. And Mr. Tucker said, "Not much longer"?

A. No.

Q. He said, "You better be looking for work for those trucks," and he told you about a job over across the Bay that Kaiser was handling?

A. No, sir.

Q. You don't remember that conversation?

A. No, sir.

Q. Do you remember of having a number of complaints from drivers that they wouldn't drive these trucks because they were unsafe?

A. No, sir.

Q. Do you remember any such complaints?

A. One.

Q. Do you remember who that was?

(Testimony of A. L. Farr.)

A. No, sir.

Q. What did you do with that driver?

A. I don't recall.

Q. Did you fire him or did he quit?

A. He complained that the brakes were bad on one. They were relined the same day.

Q. Did he continue working, or did he quit?

A. Not for us.

Q. He didn't continue driving those trucks?

A. No.

Q. Now, you furnished all the repair parts and so forth of these trucks, did you? A. Yes, sir.

Q. And maintained them during that time, from December 9th to January 18th? A. Yes, sir.

Q. Paid all the operation expense?

A. Yes, sir.

Mr. Schell: That is all.

#### Redirect Examination

Mr. Barnett: Q. Mr. Farr, who furnished these drivers for you? A. Macco.

Q. That was part of the deal that they insisted upon, is that true?

Mr. Schell: Just a moment. We object to that as leading and suggestive. [57]

The Court: Objection sustained.

Mr. Barnett: Q. Was there any conversation had with Mr. Wells relative to the furnishing of drivers by them for your equipment?

A. Yes, sir.

(Testimony of A. L. Farr.)

Q. What was that conversation?

A. He said that Macco had considerable drivers of their own on their hands, and said they didn't have any equipment, and asked us if we would absorb them.

The Court: Will you read the answer?

(Answer read.)

Mr. Barnett: That's all.

Mr. Schell: That's all.

Mr. Barnett: Mr. Thiel, please.

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HERBERT THIEL,

called for the Plaintiffs; Sworn.

The Clerk: Will you state your name to the Court and jury.      A. Herbert Thiel.

Mr. Barnett: Q. Mr. Thiel, what is your business or occupation, please?      A. Mechanic.

Q. How long have you been a mechanic?

A. Approximately around 20 years.

Q. How old a man are you, please?

A. 46.

Q. Are you specializing in trucks, auto trucks?

A. I have; in the last number of years I have.

Q. Where are you presently working?

A. I am working for G. W. Thomas Drayage Company.

Q. Directing your attention to the latter part of November, 1940, or early part of December

(Testimony of Herbert Thiel.)

of that year, were you acquainted with Mr. Farr and Mr. Sinclair?

A. I was not, until I was sent down from the union. [58]

Q. In what capacity were you sent, as a mechanic? A. Yes, sir.

Q. Did you subsequently go to work for them? A. Yes.

Q. Am I correct——

Mr. Schell: I beg your pardon.

Mr. Barnett: Q. Mr. Thiel, you worked for Farr and Sinclair while they were on this Macco job? A. Yes, sir.

Q. Are you familiar with the type of equipment they had operating at that time?

A. Yes, sir.

Q. Have you had experience in overhauling trucks of that character? A. Yes, I have.

Q. Have you operated them?

A. Yes, I have.

Q. And repaired them, I take it? A. Yes.

Q. Will you state to his Honor and to the jury, please, what the condition of the trucks was during the time you were working for them?

A. Well, I would say the trucks were in pretty good condition.

Q. On or about January 17th or 18th, what was the condition of the trucks?

A. They were in very good condition then.

Q. How many hours a day were they working?

(Testimony of Herbert Thiel.)

Mr. Schell: Just a moment. Withdraw that.

A. They were, as far as I know, working almost all the time, except when they were laid up for rain.

The Court: That answer is stricken out.

Mr. Barnett: Q. Approximately how many hours a day, assuming a day had 24 hours in it, could you tell us these trucks were working, if you know?

Mr. Schell: I object to that question as calling for the conclusion and opinion of the witness.

The Court: I don't know. If he doesn't know, he can say so. [59]

A. I was only working there 8 hours, of course; sometimes a little overtime; but as far as I know, during the time I was there they were working practically all the time, except when they might be laid up for small repair for a short time.

The Court: That answer is stricken out.

Mr. Barnett: Q. Who else did mechanical work on those trucks besides yourself?

A. There were two other mechanics on the other two shifts.

Q. By "the other two shifts," what do you mean?

A. In other words, they worked three shifts, and there was a mechanic for each shift.

Q. That is, each mechanic worked eight hours a day, is that correct?      A. That's right.

(Testimony of Herbert Thiel.)

Q. Now, you did have some sloppy weather, as you call it?           A. Yes.

Q. Is that true?           A. Yes.

Q. Is it also true on occasions all of the trucks on the job had to be hauled out by caterpillar, is that correct?           A. That's correct.

Q. These trucks were no exception?

A. No.

Q. You say they were in very good condition at the time that the work terminated?

A. That's right.

Q. What did you do after that work?

A. I went to work for Sibley.

Q. On the same job?

A. On the same job.

Q. What type of equipment did they have?

A. They have had different types, but practically on the same caliber of a truck that Mr. Farr and Mr. Sinclair had.

Q. When did you go to work for Farr and Sinclair first?

A. It was either the 3rd or 4th of December. [60]

Q. What did you do between that time and the time that the trucks actually worked on the job?

A. Worked on the trucks, done the minor repairs on there to have them in good condition when they went to work.

Mr. Barnett: That's all.

The Court: Just a moment, please.



(Testimony of Herbert Thiel.)

Cross Examination

Mr. Schell: Q. What kind of trucks did Sibley operate?

A. They have had Kleibers and—I don't know—different names. As I say, they had Kleiber trucks there.

Q. Any Autocars like this?

A. No, they didn't have no Autocars like this.

Q. Did you do any major overhauling on any of these trucks, these four Autocars?

A. Just a few.

Q. What did you do? Did you put any new transmissions in them?

A. Put in new rear ends.

Q. How many new rear ends did you put in?

A. Either one or two. One was torn when they hauled it out with the cat.

Q. Did you have any trouble clutch trouble?

A. Nothing excepting a little adjustment—that's all.

Q. Isn't it a fact, Mr. Thiel, every time they dropped the clutch it would hop off five or six feet?

A. Not to my knowledge.

Q. How about brakes on them?

A. They were all in pretty good condition, except the one that we had to reline.

Q. You just relined one set of brakes, is that correct?

A. Yes, sir.

Mr. Schell: That is all. [61]

(Testimony of Herbert Thiel.)

Redirect Examination

Mr. Barnett: Just one question, Mr. Thiel:

Q. You said you had to put in a rear end because one truck was pulled out by a cat.

A. Yes, sir.

Q. Tell us what you mean by that?

A. Well, where they dump, as it was raining very soft there, it sunk down clear to the bedding. They hooked the big cat on to it, and put the power on the truck to pull it out, to get it unloaded, and pulled the rear end out of it.

Q. By "cat" you mean caterpillar tractor?

A. Caterpillar tractor.

Q. That happened with other trucks belonging to other people——

A. Yes.

Mr. Schell: What do you mean?

The Court: Just a minute. Let counsel finish his question.

Mr. Barnett: Q. Is that correct?

A. Yes.

Q. They were pulled out by the Caterpillar?

A. Yes.

Mr. Barnett: That's all.

Recross Examination

Mr. Schell: Q. Those trucks retained their rear ends, though, didn't they?

A. I didn't get that.

Q. Those trucks retained their rear ends, though, didn't they?

(Testimony of Herbert Thiel.)

A. I don't know. Some of them have had rear ends. I know they were putting rear ends in other trucks there, too.

Mr. Schell: That's all.

Mr. Barnett: That's all. Mr. Sinclair, please.

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ROBERT SINCLAIR,

called for the Plaintiffs; Sworn. [62]

The Clerk: Will you state your name to the Court and jury.        A. Robert Sinclair.

Mr. Barnett: Your Honor, may I request that the bailiff bring over that blackboard. This witness is afflicted, as your Honor can observe, with a type of ailment that might make it difficult for him to answer questions. There is nothing the matter with his writing those answers on the blackboard, and with your Honor's permission I would like to examine the witness under those circumstances.

The Court: Have you any objection, counsel?

Mr. Schell: No, I have no objection.

The Court: All right, the Court will be very pleased to have the witness testify accordingly. Bring the blackboard over here so everybody can see it. I wonder if it would not be better to put it so both counsel face it.

Mr. Schell: I was going to suggest that we put it here and have the witness down here.

The Court: Yes, bring it a little closer.

Mr. Barnett: I don't know if the jury can see it there or not, your Honor.

(Testimony of Robert Sinclair.)

The Court: Straighten it out now, counsel. I think you better write fairly large, Mr. Sinclair. After you are through writing stand out of the way so everybody can see it.

Mr. Schell: Do you mind if I sit here?

The Court: No, if you can share the table with counsel without argument.

Mr. Barnett: We get along fine, your Honor.

The Court: I think, gentlemen, before starting this I will give the jury a recess. We will take a recess for a few moments, ladies and gentlemen of the jury. [63]

Mr. Barnett: I might mention that sometimes Mr. Sinclair can come right out with it, and other times he cannot, as your Honor observed.

The Court: Yes, anything to make Mr. Sinclair comfortable. The Court will be in recess.

(Recess.)

Mr. Barnett: May I recall Mr. Young to the stand for one question, please, your Honor?

The Court: All right.

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### FRANK YOUNG,

Recalled for the Plaintiffs; previously sworn.

Mr. Barnett: Q. Mr. Young, during the recess you called my attention to an inaccuracy you made in reference to a question that I asked.

A. Yes.

(Testimony of Frank Young.)

Q. That dealt with the date of delivery of those trucks.      A. Yes, sir.

Q. And you asked me to place you on the stand for that purpose?      A. Yes.

Q. Have you refreshed your recollection as to that date?

A. Yes, that date was about the 1st of December.

Q. What did you have in mind when you answered the 25th or 26th of November?

A. That was when we first started—they first started talking to me about buying the trucks.

Mr. Barnett: That's all.

Mr. Schell: No questions.

Mr. Barnett: Mr. Sinclair.

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ROBERT SINCLAIR,

Recalled for the Plaintiffs; previously sworn.

Mr. Barnett: Q. Mr. Sinclair, what is your present busi- [64] ness or occupation?

A. (Writing on blackboard): Truck driver.

Q. Truck driver?      A. Yes, sir.

Mr. Schell: I am awful sorry, Mr. Barnett, but I cannot read that.

The Court: Turn that around so all the jury can see it.

Mr. Barnett: Q. Have you been in the contracting business?      A. Yes.

(Testimony of Robert Sinclair.)

Q. How long have you been in the contracting business? A. (Writing): 1939.

Q. Do you recall the latter part of November, 1940, when you had a conversation with Mr. Wells?

A. Yes, sir.

Q. Where was that conversation had?

A. (Writing): Palace Hotel.

Q. Palace Hotel? A. Yes.

Q. What were the circumstances of your coming in contact with Mr. Wells?

A. (Writing): Farr and I had heard of the Bethlehem job and contacted Mr. Wells to find out if he was interested in renting trucks.

The Court: Now, just stand back out of the way, Mr. Sinclair.

(Answer read aloud by Mr. Barnett.)

Mr. Barnett: Q. Do you recall what date you first contacted Mr. Wells at the Palace Hotel?

A. No, sir.

Q. Do you remember the occasion?

A. No.

Q. Do you remember seeing him the first time?

A. Yes.

Q. Was that in a room in the Palace Hotel?

A. Yes.

Q. Am I correct in saying that Mr. Wells, Mr. Farr and yourself were present? A. Yes.

Q. Will you state to the jury, please, and to his Honor, what you said and what Mr. Wells said in reference to renting your [65] trucks? State the conversation please.

(Testimony of Robert Sinclair.)

A. (Writing): Mr. Farr made most of the conversation. He asked Mr. Wells if he was interested in renting trucks, and Mr. Wells said he probably would be as soon as he learned whether or not Macco's trucks were going to San Diego or not. Farr explained that the trucks we had in mind were Autocars, cab over engine models, and had a capacity of almost seven cubic yards water level. Mr. Wells said he was interested and to contact him in a few days.

The Court: Stand out of the way, counsel, so the jury can all read that.

Mr. Barnett: Should I read the answer to the jury?

The Court: Can the jury all read it, or shall I have it read? Apparently the jury can read it.

Mr. Barnett: I believe there are two jurors here, if your Honor please, that cannot read it.

A Juror: We would like to have you read it.

The Court: All right. Read it to the jury.

(Answer read aloud to the jury by Mr. Barnett.)

Mr. Barnett: Q. Did you contact him in a few days? A. Yes.

Q. What conversation did you have on that occasion?

A. (Writing): At the Palace Hotel Mr. Wells again would not give a final answer.

(Answer read aloud by Mr. Barnett.)

(Testimony of Robert Sinclair.)

Q. How long after this second conversation did he give you a final answer?

Mr. Schell: That is objected to as——

Mr. Barnett: Withdraw it.

Q. Did he give you a final answer?

A. Yes. [66]

Q. When was that, please?

A. (Writing): At his apartment. He told us we could consider ourselves hired.

(Answer read aloud by Mr. Barnett.)

Q. Was that after or before the time that he signed this assignment to Young & Sons?

A. Before.

Q. How long after this conversation in his apartment was it when he signed the assignment?

A. A few days.

Q. Was anything said at any of these conversations as to the length of time that you and your equipment would be used?      A. Yes, sir.

Q. Will you state to his Honor and to the jury, please, what was said and by whom?

A. (Writing): Mr. Wells said the job would last four months. He also said that Macco had many jobs all over the Coast, and after this job we could follow them around. He said he was glad to help us get started. We explained that we were buying the trucks on the strength of this contract. We had a guaranty with us at that time, which he promised to sign. He would not sign it, however,



(Testimony of Robert Sinclair.)

for the amount stipulated. He said if we would have the amount changed from \$750.00 per month to \$500.00 per month he would sign it.

The Court: You may read it, counsel.

(Answer read aloud by Mr. Barnett.)

Mr. Barnett: Q. What was said about the Macco trucks working on the San Diego job?

A. (Writing): At that time he said Macco's trucks were going to be in San Diego, and that he was glad to get our trucks. He asked us if we knew anyone else who had any idle trucks.

(Answer read aloud by Mr. Barnett.)

Q. Was anything said relative to the payment of \$750.00, which he asked be reduced to \$500.00 at the time that the guaranty [67] was presented to him?

Mr. Schell: That is objected to as leading and suggestive.

A. (Writing): I don't understand it.

The Court: Objection sustained.

Mr. Barnett: Q. Did he sign a guaranty for \$500.00? Let me put it that way. A. No, sir.

Q. Did he sign any guaranty at all?

A. No, sir.

Q. Was anything said as to the reason why he changed his mind in that regard?

A. Yes, sir.

Q. State what was said, please.

A. (Writing): He had told us he was vice-president of Macco. When we took this guaranty to him the following day, changed to \$500.00, he told

(Testimony of Robert Sinclair.)

us he was not vice-president but general superintendent and did not have the authority to sign it.

(Answer read aloud by Mr. Barnett.)

Q. Now, subsequently did you bring to him Plaintiffs' Exhibit 3, which is the assignment at the rate of \$875.00 per month? A. Yes, sir.

Q. Was anything said as to whether or not your employment would last for the period of four months so that the payments provided for in that assignment of \$875.00 for a period of four months would not be made?

Mr. Schell: That is objected to as leading and suggestive.

The Court: Objection sustained.

Mr. Barnett: Q. Was anything said as to the length of time it would take to make those payments?

Mr. Schell: Just a moment. We object to that. I think in fairness, Mr. Barnett should follow these conversations in chronological order and not attempt to lead the witness into statements. [68]

Mr. Barnett: I think under the circumstances——

The Court: The objection is sustained.

Mr. Barnett: Q. Was anything said during the conversation relative to the length of time of your employ?

Mr. Schell: Same objection.

The Court: Objection sustained.

Mr. Barnett: Your Honor, I think under the circumstances a leading question——

(Testimony of Robert Sinclair.)

The Court: The objection is sustained.

Mr. Barnett: Q. Was anything said by Mr. Wells relative—Withdraw that.

Have you given us the entire conversation between Mr. Wells and yourself relative to the payment under that assignment?

A. (Writing): At his apartment the first time we asked very directly about the length of the job, and explained that unless we were sure of working the trucks the entire four months we would not consider purchasing them. Mr. Wells assured us that the trucks would work the whole four months.

Mr. Schell: Just a moment. May I have the reporter read back that question, as I will want to make a motion to strike part of the answer.

The Court: Read it.

(Question read.)

Mr. Schell: At this time we move to strike the answer on the ground, first, it is not responsive to the question, and secondly, that the portion starting with “Mr. Wells assured us” is a conclusion of the witness and not a statement of the conversation.

The Court: Yes. Everything after “Mr. Wells assured us” may be erased from the board and stricken from the record. [69]

Mr. Barnett: Shall I read the balance of it now, your Honor?

The Court: Yes.

(Answer read aloud by Mr. Barnett.)

(Testimony of Robert Sinclair.)

Mr. Barnett: Q. What did he say in response to your statement?

A. (Writing): He said the trucks would stay on the job the entire four months, and not to worry after that. He said we could work the trucks on other Macco jobs.

(Answer read aloud by Mr. Barnett.)

Q. Now, Mr. Sinclair, you say you have been a contractor? A. Yes, sir.

Q. Has that been independent contracting work?

A. No, sir.

Q. What type of work was that?

A. That was hauling.

Q. How many trucks did you run while you were in that businesses?

A. (Writing): I owned three, but I hired as many as ten more.

(Answer read aloud by Mr. Barnett.)

Q. In that work did you become familiar with and did you work on various types of trucks?

A. Yes, sir.

Q. Can you state what the condition of the four trucks we are concerned with was when you purchased them?

A. Yes. (Writing): The trucks needed work, fan belts, water hoses, wiring, et cetera, and needed replacing. Motors, transmissions, differentials, drive lines, et cetera, were in good condition.

Q. On what day did you take delivery of these four trucks? A. I can't recall.

(Testimony of Robert Sinclair.)

Q. Approximately? A. No——

Q. Maybe you better write it there.

A. (Writing): About December 2nd, 1940.

Q. What was the first day that these trucks went to work? [70] A. December 9th.

Q. Between the 2nd and 9th, what work, if any, was done on the trucks?

A. We repacked——

The Court: Get him another piece of chalk, Mr. Bailiff.

A. (Writing): We repacked the wheel bearings, checked them over, installed headlights, and general repairs as needed.

(Answer read aloud by Mr. Barnett.)

Mr. Barnett: Q. What was the condition of the trucks on the 9th of December when you first went to work, at least when you first worked the trucks?

A. The trucks were in good condition. However, we had quite a lot of trouble. Fan belts, radiator hoses, and generators were bad. We immediately replaced the parts, and also relined the brakes on one truck, and had one hoist overhauled.

(Answer read aloud by Mr. Barnett.)

Q. After you did that work what was the condition of the trucks? A. Good shape.

Q. On January 17th or 18th what was the condition of the trucks? A. Excellent.

Q. Excellent? A. Yes.

(Testimony of Robert Sinclair.)

Q. What arrangements did you make with Mr. Wells relative to the compensation you were to receive for your personal services, as well as for the drivers, if any? A. None.

Q. How much was paid per hour for the use of the trucks?

A. (Writing): \$2.70 plus driver.

(Answer read aloud by Mr. Barnett.)

Q. Is that \$2.70 per hour per truck?

A. Per hour per truck.

Q. In addition to that how much were you to receive for the salaries of the drivers?

A. (Writing): Depending on union scales. [71]

Mr. Barnett: May it be stipulated at this time, counsel, and I take this as an offer of proof, that it was \$1.428 per hour?

Mr. Schell: I don't think that is quite correct, but I will check it.

Mr. Barnett: It is \$1.42851 per hour. I wanted that for the record; and \$9.00 for seven hours work. That is admitted in the pleadings, your Honor. I will pass that for the time being.

Q. In addition to furnishing these trucks, did you furnish your own personal services?

A. Yes.

Q. From whom did you secure the drivers?

A. (Writing): Macco hired the drivers and assigned them to the trucks.

Q. Did Macco pay the drivers to work?

A. Yes.

(Testimony of Robert Sinclair.)

Q. So of this amount of \$1.42 plus per hour, that was not credited to you at all; that was paid direct to the driver?      A. That's right.

Q. Now, directing your attention to the period you actually worked on the job, can you state how many days you worked? When I say "you" I mean the trucks as well as yourself.

A. (Writing): 17 days.

Q. 17 days?      A. Yes.

Q. How many hours per day did you work?

A. (Writing): Farr or myself was there all the time.

(Answer read aloud by Mr. Barnett.)

Q. How many hours per day did the trucks work?

A. (Writing): Supposed to work 21.

Q. Not what they were supposed to work; how many did they work?

A. I don't know. Do you mean—— [72]

Q. Were they on three shifts?

A. (Continuing): ——actual hours?

Q. Yes. Well, how many hours did the job work per day?

A. (Writing): 21.

Q. 21?      A. Yes.

Q. When were you told that your services were no longer needed?      A. Yes, sir.

Q. When was that?      A. January 18, 1940.

Q. Would you state the circumstances under which you were told that?

(Testimony of Robert Sinclair.)

A. (Writing): Mr. Tucker drove up at 2:30 P. M. and told me we were all through at 3:30 P. M.

(Answer read aloud by Mr. Barnett.)

Q. Who is Mr. Tucker?

A. Assistant Superintendent.

Q. Was he on the job during the time you were there?      A. Yes.

Q. Yes?      A. Yes, sir.

Q. Had you had any conversation with Mr. Tucker or anyone else prior to this time as to the terms of your contract?

A. No, sir.

Q. No?      A. No, sir.

Q. And on January 18th, at about 2:30 P. M. was the first time that you knew you were through, is that correct?      A. That's right.

Q. Did you receive any money for the services that you rendered?      A. No, sir.

Q. Did you receive money for the services the trucks had rendered?      A. No, sir.

Q. Did you keep a record of the total amount of working hours worked by trucks?

A. Yes, sir.

Q. Did you keep a record of the profits made in the operations of those trucks?

A. Yes, sir.

Q. Did you estimate altogether what your net profits would have [73] been had you been permitted to complete your contract?      A. Yes, sir.



(Testimony of Robert Sinclair.)

Q. Will you state how much per hour net per truck?      A. Per truck net profit?

Q. I mean per truck what you would have made had the contract been completed?

Mr. Schell: To which we object as incompetent, irrelevant and immaterial, and highly speculative, with no foundation laid.

The Court: The objection is sustained. It is a jury question.

Mr. Barnett: Q. Had you had experience in keeping records of the cost, the overhead and the profits made in trucking operations?

A. Yes, sir.

Q. How many years does that experience cover?

A. Five.

Q. Five years?      A. Yes.

Q. In considering the profits, what do you take into consideration?

A. (Writing): Cost of gas, cost of insurance, cost of breakdowns, cost of mechanics, cost of parts, cost of depreciation.

Q. Did you keep such a record on this job?

A. Yes, sir.

Q. What was the amount of net profit per truck hour that you made on this job?

A. 75 cents per truck hour.

Q. 75 cents per truck hour?      A. Yes, sir.

Q. Did you figure that per day?      A. Yes.

Q. Would that be three per day per truck hour?

A. Yes.

Q. I will withdraw it. How much would that be for your total operation per day?

(Testimony of Robert Sinclair.)

A. For total operation?

Q. Yes.

Mr. Schell: That is objected to as calling for the con- [74] clusion of the witness. It is too vague and indefinite as to how many hours the truck worked and he had worked.

Mr. Barnett: It is preliminary, your Honor. I will connect it up.

The Court: Objection sustained.

Mr. Barnett: Q. How many hours per day per truck did your trucks work on the job?

A. How many hours per—average?

Mr. Schell: Just a minute. I think the average is no good. He said he had absolute figures, of how much they worked.

Mr. Barnett: Your Honor, that is a subject of cross examination.

The Court: Objection sustained.

Mr. Barnett: Q. In arriving at that figure of 75 cents per truck hour per truck, can you state to the jury how you arrived at that figure?

A. Yes, sir.

Q. State in detail how you arrived at that?

A. (Writing): Actual expense on job: Insurance, 27 cents per truck hour; parts, 42 cents per truck hour; mechanics, 32 cents per truck hour; gasoline and grease, 58 cents per truck hour; down time, 36 cents per truck hour; \$1.95 per truck are total expenses per truck hour.

(Answer read aloud by Mr. Barnett.)

(Testimony of Robert Sinclair.)

Q. How many hours per day did the trucks actually work, average, on the job, prior to the 18th day of January, 1941?

Mr. Schell: That is objected to as calling for an average. If he has the figures on how much they worked, that is another thing.

The Court: Objection sustained.

Mr. Barnett: Q. Can you tell us how many hours the trucks worked while on the job per day?

[75]

A. Not from my own records.

Mr. Barnett: For the purpose of the record, your Honor, I believe that we have the right in placing before the jury the average hours per truck per day over this period.

The Court: I have ruled that you haven't. Make up your record. I don't care to hear any argument about it.

Mr. Barnett: It was only in the spirit of cutting time and shortening the amount of detail that I asked that question.

The Court: Counsel is entitled to have the figures if they are available.

Mr. Barnett: Yes. Would your Honor care for a citation on that point?

The Court: No.

Mr. Barnett: Q. Will you look at all of these figures—withdraw that.

Does your Honor want to continue with these?

(Testimony of Robert Sinclair.)

I assure you it is going to take a considerable length of time, or would your Honor care to recess at this time? I believe it will take at least three-quarters of an hour, or an hour, in view of the objections.

The Court: Ladies and gentlemen of the jury, the Court will excuse you at this time until 10 o'clock tomorrow morning. You will observe the usual instructions regarding communications. You may now retire.

(Thereupon the jury retired.)

The Court: I can say, counsel, that I think that the total number of truck hours ought to be sufficient; counsel is objecting, and I rule very strongly on that type of proof. It seems to me if he has a record of total number of truck hours, that would be the actual amount—— [76]

Mr. Schell: The only thing that I can say, of course, is there is a divergence about these matters. The particular question I was objecting to was the average per day, and that is very material.

Mr. Barnett: All I had in mind was what your Honor said. We have added up the work sheets, and we have the total number of hours worked, and that will average so many per day. If you insist upon it we will go through each one of these, but it will take a tremendous length of time. But we have averaged them up. One day a truck may have worked so many hours, and the next day will maybe be more or less; but we have averaged them up. I don't recall the figure at the moment, but what

I was getting at was to show so many hours average per day; whether 10 or 18 hours a day is immaterial if the total is there.

The Court: I suggest you prove the total number of truck hours on the job, and then you can argue average, if you want to.

Mr. Barnett: I think you are right, your Honor. I did not think about that.

The Court: The average is a question of computation, and it is a deduction or inference you can draw from proven facts when you have the total number of hours.

Mr. Barnett: I was doing it backwards. I was going to have the average time per day.

The Court: I think you can prove the total number of truck hours.

Mr. Barnett: Very well, your Honor, I will try to get away from all this detail if I can.

The Court: Court is now in adjournment until tomorrow morning at 10 o'clock.

(Thereupon an adjournment was taken until 10 o'clock A. M. Friday, March 6, 1942.) [77]

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Friday, March 6th, 1942  
10 o'clock A. M.

The Court: You may proceed.

Mr. Barnett: Mr. Sinclair, please.

ROBERT SINCLAIR,

Recalled.

Direct Examination

(Resumed)

Mr. Barnett: Q. Now, yesterday you told us that your net profit per truck per hour was .75, and you set down certain figures on the board. Now, on those figures did you take into consideration the salary paid to any driver?

A. Macco paid them.

Q. Macco paid them. Was that amount in addition to the \$2.70 per hour which your trucks were to receive?

A. Yes, sir.

Q. Did you during the evening recess, as suggested by his Honor, make a compilation of the total hours worked while you were on the job?

A. Yes, sir.

Q. How many hours did your trucks work during that time? Write it down if you cannot talk.

A. (Writing): 669.

Q. 669 hours? A. Yes, sir.

Q. I show you four packages of bundles of pink slips. Will you tell us what they are, please?

A. (Writing): These are time reports made out by the drivers at the end of each shift. They show the time the truck worked and the time the truck was down. Also condition of truck.

Mr. Barnett: Shall I read that, your Honor?

The Court: Yes.

(Answer read aloud by Mr. Barnett.)

(Testimony of Robert Sinclair.)

Mr. Barnett: We offer this as plaintiffs' exhibit next [78] in order.

The Court: Is there any objection?

Mr. Schell: No objection.

(Daily truck reports marked Plaintiffs' Exhibit No. 4.)

Mr. Barnett: Q. At whose request, or under whose supervision were these work sheets made?

Mr. Schell: That is objected to as calling for the conclusion and opinion of the witness.

A. Macco.

Mr. Barnett: Q. Macco? A. Macco, yes.

Q. What would happen to the slips after they were made out?

A. (Writing) A copy was put in the office, and one was given to us.

Q. A copy was put in the office and one was given to you? A. Yes.

Q. And after each shift the driver would fill out the original and a copy, and put one in the office and give one to you, is that correct?

A. Yes.

Q. In arriving at the compilations as to the total time worked, as well as your profits, did you use those slips? A. Yes.

Q. And the other data you have told us about, is that correct? A. Yes.

Q. In checking over those slips, Mr. Sinclair, I notice that there is no record for the 9th of De-

(Testimony of Robert Sinclair.)

cember, that these records start, I believe, on the 16th of December.      A. Yes, sir.

Q. Will you explain that to the jury, please?

A. (Writing) These slips were not available until the 16th.

Mr. Barnett: Should I read that, your Honor?

The Court: Yes.

(Answer read aloud by Mr. Barnett.) [79]

Mr. Barnett: Q. You mean the 16th of December, is that correct?      A. Yes.

Q. Did your trucks work—withdraw that. When did your trucks first work on the job?

A. On the 9th.

Q. December 9th?      A. Yes.

Q. Did they work between the 9th and 16th?

A. I have no recollection of how much they worked during this time.

The Court: That isn't an answer to the question. Did they work is the question.

A. I don't know.

Mr. Barnett: Q. Have you any recollection of whether or not they worked between that time?

A. No, sir.

Q. Do you recall them working on the 9th of December?      A. Yes, sir.

Q. Did they work again on the 16th?

A. Yes, sir.

Q. Do you know what occurred between that time with reference to the workability of the trucks?      A. No.



(Testimony of Robert Sinclair.)

Q. Were any repairs made, or was anything done to the trucks that day, and if so, tell us the circumstances.

A. The real work did not start until the 16th. There was only one shovel on the job. After the first day Mr. Wells suggested that we put cab shields on the trucks, which we did between the 9th and the 16th. We also put on steel sideboards, as the shovel had on wooden sideboards.

(Answer read aloud by Mr. Barnett.)

Q. What was the purpose of the cab shields?

A. It protects——

Q. The driver?           A. The driver, yes, sir.

Q. It protects the driver?           A. Yes, sir.

Q. Is that a steel shield that goes entirely over the cab around the driver seat?           A. Yes.

Q. You mentioned something about steel planks on the truck. [80]           A. Yes, sir.

Q. What was the experience, or your experience on the first day in reference to those boards that you had on them?

A. The shovel brake are wooden sideboards.

(Answer read by Mr. Barnett.)

Mr. Barnett: I think that is all, your Honor. Oh, just one question.

Q. Oh, Mr. Sinclair, you testified yesterday that at the hour of 2:30 on January 18th, you were told that you were through at 3:30.           A. Yes, sir.

Q. Did you have any other notice prior to that

(Testimony of Robert Sinclair.)

day that your services would not be required for the duration of the job?      A. Never.

Q. After receiving that notice, what did you do?

A. (Writing) There wasn't anything to do.

Mr. Schell: I move the answer go out as not responsive.

The Court: Objection sustained.

Mr. Barnett: Q. I have in mind reference to your securing other work or other employment or other contracting jobs for the trucks.

A. (Writing) I went to several contractors and attempted to find work for the trucks. We were unsuccessful, mainly because there was no jobs going on.

(Answer read aloud by Mr. Barnett.)

Q. Did you and Mr. Farr subsequently find employment?      A. Yes, sir.

Q. Can you state to us approximately how much money you and Mr. Farr earned between January 18th and April 16th?      A. Yes, sir.

Q. Would you do so, please?      A. \$500.00.

Q. \$500.00?      A. Yes, sir. [81]

Q. What happened to the trucks?

A. (Writing) We left them on the job.

Q. Were they subsequently repossessed or taken by Young & Son?      A. Yes, sir.

Q. And subsequently sold by them?

A. Yes, sir.

Q. Do you know the amount that they sold them for?      A. No, sir.

(Testimony of Robert Sinclair.)

Mr. Barnett: May it be stipulated that it is \$2,000, counsel? I believe that is what the pleadings set forth. I make that offer of proof in the spirit of saving time by not having to put Mr. Young on the stand again.

Mr. Schell: I wanted to put him on the stand to ask him a couple of questions.

Mr. Barnett: May it be stipulated he would so testify at this time, and you can put him on as far as your case is concerned?

Mr. Schell: No, I won't.

Mr. Barnett: All right.

Q. He has sent you a bill, or at least he claims you owe him \$1500?

Mr. Schell: Just a minute. That is objected to as incompetent, irrelevant and immaterial, and not the best evidence.

The Court: I think it is the best evidence. He may answer. A. Yes, sir.

Mr. Barnett: Q. Do you recall approximately how much money you spent and you became liable for in adjusting, tuning up, overhauling and making ready the auto trucks for this job; in other words, getting prepared for this job?

A. (Writing) Do you mean actually how much we spent?

Q. I mean the total amount that you spent, and what you became [82] liable for.

A. (Writing) Yes, sir, I can, approximately.

Q. Will you state it please, or write it on the board?

(Testimony of Robert Sinclair.)

A. (Writing) Approximately \$700.00.

Q. Approximately \$700.00? A. Yes, sir.

Q. In addition to that amount did you make expenditures while you were on the job, or become liable for them? A. Yes, sir.

Q. Approximately how much is that?

A. (Writing) Does that mean gas and oil?

Q. No, I don't mean upkeep; I mean expenses that might be charged against you, or that he claims for the preparation of the job, tires and things of that sort. A. \$400.00.

Q. Four? A. Yes.

Q. Or \$1100.00 in all, is that correct?

A. Yes.

Q. That doesn't include oil or gas, or anything of that sort? A. No.

Q. Were there any other expenses you incurred in preparation for this work, and when I say that I mean all during that period of a week where you made certain charges to adjust your equipment for that work?

A. Just personal expenses.

Q. Do those figures include the steel planks and the cab shields? A. Yes, sir.

Mr. Barnett: I think that is all, your Honor, from this witness. Thank you.

#### Cross Examination

Mr. Schell: Q. Mr. Sinclair, you say these trucks started to work on the 16th again?

A. Yes, sir.

(Testimony of Robert Sinclair.)

Q. Now, you had those trucks numbered 11, 22, 33 and 44, did you not?

A. (Writing) They were 1, 2, 3 and 4. [83]

Q. Were the numbers changed on them?

A. Yes, sir.

Q. When? A. I don't know.

Q. Later they were known as 11, 22, 33 and 44, were they not? A. Yes, sir.

Q. Now, from your tabulations, or from the original figures, the original records, will you tell us how much time the No. 11 worked on the 16th?

A. (Writing) 3½ hours.

Q. 3½ hours? A. Yes.

Q. Have you got that slip available? Can you lay your hands on that one for a moment, the No. 11 truck for the 16th?

(Document handed to witness.)

A. No, sir, I don't see it here—yes, sir.

Q. During that day I notice here that this slip is made out in apparently—it looks like a carbon.

A. Yes, sir.

Q. And then in the carbon is written the No. 11, and “3 hours” under “hours worked,” and underneath that is written “3 hours” in pencil. Who put that in? A. I did.

Q. You did? A. Yes.

Q. This record is the record kept by the driver whose particular name happens to be Walter E. Wood, wasn't it? A. Yes, sir.

(Testimony of Robert Sinclair.)

Q. How many hours did they charge in the driver's record?

A. If you will notice the half hour is down time.

Q. That makes  $2\frac{1}{2}$  hours net?

A. 3 hours.

Q. You have 3 hours and  $\frac{1}{2}$  an hour down time. Now, underneath "Remarks" is "Needs work on motor," and "Cause for delay, motor trouble," and "Further repairs needed—light switch." Those were all on there at the time, were they not?

A. Yes, sir.

Q. Will you look at your book and tell us how many hours truck No. 22 worked on that day?

A. (Writing) The same?

Q. No. 11.

A. (Writing) No, the same. [84]

Q. The same? A. Yes.

Q. Can you find the slip for truck 22 for that day? A. Yes, sir.

Q. That slip was signed by whom?

A. (Writing) By A. L. Farr.

Q. By A. L. Farr, the plaintiff in this case?

A. Yes, sir.

Q. That truck worked three and a half hours?

A. Yes, sir.

Q. That truck worked three and a half hours?

A. Yes, sir.

Q. Now, how about truck 33, did that work that day? A. No, sir.

Q. Did truck 44 work that day? A. No.

Q. You will have to answer audibly.

(Testimony of Robert Sinclair.)

A. No.

Q. It did not? A. It did not.

Q. Now, the shovels worked 14 hours that day, didn't they? A. I don't know.

The Court: You better write these answers. The reporter is not getting this, and I am not getting it, and perhaps the jury isn't.

A. (Writing) I do not know.

The Court: Will you take the responsibility of reading the answers, counsel?

Mr. Schell: Yes, your Honor. I am sorry, your Honor.

Q. Now, on the 17th, how many hours did No. 11 work? A. None.

Q. None? A. None.

Q. And the shovel worked 7 hours that day, did it not? A. I don't know.

The Court: I am sorry, Mr. Sinclair. I didn't hear it and I don't know whether the reporter did or not. Will you please write it on the board.

A. (Writing) I don't know.

(Answer read aloud by Mr. Schell.) [85]

Mr. Schell: Q. Now, how many hours did No. 22 work that day? A. 7 $\frac{1}{4}$ .

Q. Have you that slip there?

A. (Writing) There are two slips for that?

(Answer read aloud by Mr. Schell.)

Q. Mr. Sinclair, I notice here on one report you say there are two slips on that, and it is signed

(Testimony of Robert Sinclair.)

by Walter Wood. It gives truck 22 as 6 hours and 15 minutes, is that right?      A. Yes, sir.

Q. Then the next report for that same day is also signed by Walter Wood, and says, "Hours worked—1 hour," and "Cause for delay—other truck down." And somebody wrote in pencil here "Truck 22."      A. (Writing) I did that.

Q. How much did truck 33 work that day?

A. None.

Q. None. How much did truck 44 work that day?      A. Six.

The Court: Q. Six hours?      A. Yes.

Mr. Schell: Q. Six hours. Now, we will skip to the 19th. The shovels worked 21 hours that day, did they not?      A. I don't know, sir.

Q. You don't know?      A. No, sir.

Q. How many hours did No. 11 work on that day?      A. (Writing) 9½.

Q. 9½. How many hours did truck No. 2 work that day?      A. 7½.

Q. 7½.

Mr. Barnett: Does counsel refer to truck 22 in that last question?

Mr. Schell: My intention was to say "22."

The Court: You said "2."

Mr. Schell: I beg your pardon.

Q. Was there any down time on No. 22 that day? [86]

A. (Writing) I think there was a half hour.

Q. On the same day, the 19th, how many hours did truck 33 work?      A. 20½.



(Testimony of Robert Sinclair.)

Q. How much down time? A.  $\frac{1}{2}$  hour.

Q.  $\frac{1}{2}$  hour. 20 $\frac{1}{2}$  is the first figure, and  $\frac{1}{2}$  hour for the down time, is that right? A. Yes.

Q. Have you the slip for this last truck, 33, for that date? A. Four slips.

Q. Four slips? A. Yes.

Q. May I see them, please. Mr. Farr signed one of those slips, did he? A. Yes, sir.

Q. Did you drive any of these trucks yourself?

A. (Writing) Only to and from the job, or in the yard.

(Answer read by Mr. Schell.)

Q. When you discussed with Mr. Wells the matter of doing hauling, nothing was said about your driving the trucks personally, was there?

A. No, sir.

Mr. Schell: Did your Honor hear that answer?

The Court: No, I didn't hear it.

Mr. Schell: The answer was "No, sir."

Q. In other words, you were devoting your time to the operation of the business, is that right?

A. That is true.

Q. The business of Farr and Sinclair, is that right? A. Yes, sir.

Q. That at that time was the trucking business? A. Yes, sir.

Q. Now, these mechanics you had, did you do any mechanical work in addition to the work these mechanics did? A. Yes, sir.

Q. What was the total of the mechanics' sal-

(Testimony of Robert Sinclair.)

aries and insurance during the period from December 9th to January 18th, inclusive? [87]

A. \$688.69.

Q. \$688.69? A. Yes, sir.

Q. How much additional was there for insurance?

A. (Writing) That was included in that figure.  
(Answer read by Mr. Schell.)

Q. Now, there is no time included in that figure for your work or for Mr. Farr's work, is that right? A. No, sir.

Q. Better write that down.

A. (Writing) No.

Q. Have you figured out from the number of hours how much per hour mechanics' time was on those trucks, mechanics' and insurance time?

The Court: Do you mean average?

Mr. Schell: Yes, the average for the period of time they worked. A. No.

Q. Well, Mr. Sinclair, yesterday—. Oh, the answer is "No." You said that the mechanics' time was 32 cents—cost of mechanics' time was 32 cents per operating truck hour? A. Yes.

Q. You stated this morning that the total time that those four trucks worked was 669 hours?

A. Yes, sir.

Q. And your mechanics' time is \$688.69?

A. Yes, sir.

Q. So that the cost per hour of your mechanics'

(Testimony of Robert Sinclair.)

time and insurance is something in excess of a dollar an hour, is it not?      A. No, sir.

Q. There were 669 hours work for all four trucks?      A. Yes, sir.

Q. Now, how much was the unpaid bills for parts at the conclusion of the job?

A. (Writing) I can only make that approximation.

(Answer read by Mr. Schell.)

Q. Now, Mr. Sinclair, to refresh your memory, didn't you have [88] bills of \$716.39 at the end of the job for parts?      A. No, sir.

Q. What is your approximation of the amount of the bills outstanding at the end of the job?

A. The amount of the bills was approximately \$818.00, but these bills were not all for parts.

Q. How much of them were for parts?

A. Approximately \$300.00.

(Answer read by Mr. Schell.)

Q. Now, Macco had paid some bills for you, had they not—some parts of your request?

A. (Writing) I don't know if the bills were paid.

Q. Mr. Sinclair, you say that only approximately \$300.00 of those bills were for parts. What was the balance of them for?

A. The balance was for permanent improvements on the trucks, which we considered capital investment.

(Testimony of Robert Sinclair.)

Q. Now, Mr. Sinclair, you paid \$3500 for those four trucks, is that correct? A. Yes, sir.

Q. You say when they left the job on the 17th or 18th of January they were in very good condition? A. Yes, sir.

Q. Had you made the payment to Young & Son that was due in the early part of January?

A. (Writing) Macco was supposed to make the payments direct.

Mr. Schell: I move the answer go out as not responsive.

The Court: What was the question?

(Question read.)

The Court: The answer is stricken out.

Mr. Schell: Q. Will you answer that question yes or no, Mr. Sinclair; have you made the payments? A. (Writing) No, I had not.

Q. Now, Mr. Sinclair, in your testimony yesterday you said that [89] one of the items to be taken into consideration in determining costs was depreciation. A. Yes, sir.

Q. But in your figure that you put down yesterday you had mechanics at 32 cents per hour, insurance 27 cents, parts 42 cents, gasoline 58 cents and down time 36 cents, for a total of \$1.95. Did you figure anything on depreciation?

A. (Writing) The trucks did not depreciate. They increased in value.

Q. Now, when your contracts terminated on the 18th of January, as you claimed, did you try to sell those trucks that had increased in value?

(Testimony of Robert Sinclair.)

A. No.

Q. In the figures that you had down on the board in determining costs, did you have anything for wear and tear on tires?      A. Yes, sir.

Q. Where was that?      A. I mean no, sir.

The Court: The answer was "No."

Mr. Schell: Q. You had included nothing in your cost for depreciation or for tires?

A. No, sir.

Q. What is the cost per operative truck hour on tires on this type of truck? Have you ever kept a record of that?

A. Yes, but I could not say offhand.

Q. To refresh your recollection, isn't it about 20 cents per operated hour?

A. (Writing) I don't know, sir.

Q. Now, this insurance that you had here was 27 cents,—as an item, what kind of insurance does that cover?

A. (Writing) Collision, property damage, public liability.

(Answer read by Mr. Schell.)

Q. That is the 27 cent item, is that right?

A. Yes.

Q. Now, under your arrangement with Macco you also paid the compensation insurance on the drivers, did you not? [90]

A. (Writing) I don't know.

Q. Mr. Sinclair, you went into the office of the

(Testimony of Robert Sinclair.)

Macco Construction Company from time to time and checked your account, didn't you, with them?

A. (Writing) Only once.

Q. Only once? A. Yes.

Q. And when was that?

A. (Writing) At the time we were terminated.  
(Answer read by Mr. Schell.)

Q. At that time you went over the accounts with Mr. Tucker, did you not? A. Yes, sir.

Q. No mention was made at that time of any contract between you and Macco?

A. (Writing) I don't remember.

Q. You don't remember. Isn't it a fact that at that time Mr. Tucker showed you an itemized list of all the income and the expenses?

A. Yes, sir.

Q. At that time you stated that this account was substantially correct, did you not?

A. Yes, sir.

Q. You said "Yes"? A. Yes.

Mr Schell: Did your Honor hear that "Yes, sir"?

The Court: Yes.

Mr. Schell: Q. In that there were several additional items, were there not, such as payroll, taxes, like social security?

A. (Writing) I have here an item that reads, "Drivers' time compensation at 11 per cent—8979."

(Answer read by Mr. Schell.)

(Testimony of Robert Sinclair.)

Q. That item was not figured by you in arriving at your cost of operation, was it?

A. No, sir.

Q. Did you figure anything for social security to drivers? A. No, sir.

Q. You said that you figured mechanics' time at 32 cents an [91] hour? A. Yes, sir.

Q. How did you figure that?

A. (Writing) Under normal operations we would use one mechanic per shift at \$9.00.

(Answer read by Mr. Schell.)

Q. In your direct examination you said that you had made a profit of 75 per cent.

The Court: 75 cents.

Mr. Schell: 75 cents per operated hour per truck. A. Yes, sir.

Q. During the period from December 9th to January 18th? A. Yes, sir.

Q. In arriving at that figure did you take in the actual cost of the mechanics that you put out in this particular time?

A. (Writing) Most of the mechanical work was done for the purpose of putting the trucks in shape for the job, and naturally was charged to capital investment.

(Answer read by Mr. Schell.)

Q. Isn't it a fact, Mr. Sinclair, that taking in all of the expenses, whether they were charged by you to capital or otherwise, that the operations

(Testimony of Robert Sinclair.)

during that period from December 9th to January 18th resulted in a loss?

A. I don't know how——

The Court: Just write your answer on the board?

A. (Writing) I don't know how to answer that.

(Answer read by Mr. Schell.)

Mr. Schell: Q. Mr. Sinclair, this account that you went over with Mr. Tucker, which you said was substantially correct, had \$300 and some odd dollars in it, didn't it, left in the hands of Macco?

A. (Writing) Approximately \$400.

Q. A little less than \$400, wasn't it?

A. No. [92]

Mr. Schell: The answer was "Approximately \$400."

Q. There were \$810 worth of outstanding bills, is that right? A. That's right.

Q. Or \$818, wasn't it? A. Yes.

Q. That didn't even take into account your assignment to Young & Son? A. No, sir.

Q. In these computations or cost of operations you made, you haven't included anything for your time, or for the time of Mr. Farr, have you?

A. No, sir.

Q. What do you figure the value of your time?

A. \$1.25 per hour.

Q. \$1.25 per hour? A. Yes, sir.

Q. What do you figure the value of Mr. Farr's time? A. (Writing) The same.



(Testimony of Robert Sinclair.)

The Court: Is that going to be somewhat protracted, counsel?

Mr. Schell: I have about 10 or 15 more questions, your Honor.

The Court: We will take a short recess now. Court will be in recess.

(Recess.)

Mr. Schell: Q. Mr. Sinclair, in arriving at these various figure of so much per operated hour for mechanics, you were using the basis of the trucks working 21 hours a day, were you not?

A. Yes, sir.

Q. Therefore, if the trucks didn't average 21 hours a day, each of these figures per hour would go up? A. No, sir.

Q. Well, in taking mechanics at \$9.00 per day——

Mr. Barnett: May I suggest that the witness wants to write something down, your Honor. [93]

A. (Writing): I allowed for breakdown time.  
(Answer read by Mr. Schell.)

Mr. Schell: Q. Will you tell us, just by way of example, in arriving at the item of parts of 42 cents per operated hour, just how you arrived at that?

A. (Writing): I took the actual cost of the parts purchased on the job, and divided it into the total number of hours worked.

(Answer read by Mr. Schell.)

(Testimony of Robert Sinclair.)

Q. What was the sum you used as the total cost of the parts? A. (Writing): \$262.34.

(Answer read by Mr. Schell.)

Q. Mr. Sinclair, did you take into consideration the three hundred odd dollars worth of bills for parts that were still outstanding?

A. (Writing): Those bills were not for parts.  
(Answer read by Mr. Schell.)

Q. Mr. Sinclair, I understood you to say a little while ago that \$300 worth of those were for parts?

A. (Writing): I said approximately.  
(Answer read by Mr. Schell.)

Q. Did you include that \$300 in the amount of the cost of the parts?

A. (Writing): I don't understand.  
(Answer read by Mr. Schell.)

Q. Let us get it this way: How much did you actually pay out yourself for parts in cash?

A. (Writing): I did not purchase parts for cash. The money I paid out was for improvements.  
(Answer read by Mr. Schell.)

Q. What do you call improvements?

A. (Writing): Anything that improves it, such as headlights, windshields, et cetera.  
(Answer read by Mr. Schell.)

Q. Now, Mr. Sinclair, in arriving at the cost of mechanics' [94] time, will you put down how you arrived at that?

(Testimony of Robert Sinclair.)

A. (Writing): Total?

Q. The mechanics' time?

A. (Writing): I have, sir.

Q. I thought this was parts.

A. (Writing): I said under normal operations we would use one mechanic per shift at \$9.00.

(Answer read by Mr. Schell.)

Q. Now, taking a three shift day, that would be how much for mechanics—\$27.00, would it not?

A. Yes.

Q. Put that down, will you.

A. (Writing): Yes.

Q. How many hours of truck time did you use for that same period?

A. (Writing): Each truck and 21 hours per day, or 84 truck hours.

Q. That gave you 32 cents, did it?

A. Yes, sir.

Q. Then that figure contemplated that each truck worked the full 21 hours every day?

A. (Writing): I allowed for breakdown time at the rate of 12 truck hours per day. Actually on the job, breakdown time was 9 per cent.

(Answer read by Mr. Schell.)

Q. Is that how you arrived at this figure of 36 cents?      A. Yes, sir.

Q. That is the cost of the man, the driver, while you are paying the driver for breakdown time?

(Testimony of Robert Sinclair.)

A. (Writing): The cost of driving and also lost time.

(Answer read by Mr. Schell.)

Q. Mr. Sinclair, you stated you had been in the trucking business how long?

A. (Writing): Since 1939.

Q. What business were you in in September and October, of 1940?

A. I had sold out to my partner and was looking for a job with trucks.

(Answer read by Mr. Schell.)

Q. When had you sold to your partner?

A. (Writing): About [95] August 30th.

(Answer read by Mr. Schell.)

Q. What was that partner's name?

A. (Writing): C. E. Butler was involved—. May I erase that?

Mr. Schell: Yes, as far as I am concerned you may erase that.

A. (Writing): T. W. Bowlin.

Q. By the way, Mr. Sinclair, on this hauling that you did there at the Bethlehem job, where was that hauling from and where to?

A. (Writing): From the hill to several different places.

Q. What are some of the city streets you went over?

A. (Writing): I don't know the names of any except Third Street.

(Answer read by Mr. Schell.)

(Testimony of Robert Sinclair.)

Q. And Third Street is a street in the City of San Francisco?      A. Yes.

Mr. Schell: Did your Honor hear that? He said "Yes."

The Court: Yes.

Mr. Schell: Q. What type of work did you do from the 9th of December to the 18th of January? What duties did you perform?

A. (Writing): I helped our mechanic.

Q. Did you do any supervising of the operation of the trucks, that is, watch the drivers to see that they properly drove them?

A. (Writing): Yes, only as far as their driving was concerned.

(Answer read by Mr. Schell.)

Q. Did you also let any men go?

A. No, sir.

Q. Mr. Farr did all the firing?

A. Yes, sir.

Q. At the time that you had the conversation with Mr. Wells when you presented the guaranty to him and he stated that he did not have any authority to sign it, had you purchased the trucks at that time?      A. No, sir.

Q. Where did you do your mechanical work? Did *you a job?* [96]

A. (Writing): We used an old building at the Bethlehem yard along with other truck owners.

(Answer read by Mr. Schell.)

(Testimony of Robert Sinclair.)

A. (Writing): We were all requested to move out, and thereafter did our work in the open.

Mr. Schell: He has added, "We were all requested to move out, and thereafter did our work in the open."

Q. During the time from December 9th, 1940, to January 18th, 1941, did you devote all of your business time to the operation of this trucking business? A. Yes, sir.

Mr. Schell: I think that is all.

#### Redirect Examination

Mr. Barnett: Q. Mr. Sinclair, you were asked by Mr. Schell on cross examination the total time paid to the mechanics, and I believe you stated it \$688.00, and then you were asked the total hours worked. Would you like to explain that answer as affecting the arriving at your net profit?

A. Yes, sir.

Q. Would you do so, please?

A. (Writing): The mechanical work which was done on the trucks was anticipated. We expected to have to spend quite a sum of money to put these trucks in shape. Naturally, this amount cannot be charged to normal operation expenses. If we had been permitted to finish the job, the normal operating expenses for mechanics would have been the figure established.

Mr. Schell: We move to strike the last portion of the answer as a conclusion of the witness; that is, that portion from, "if we had been permitted," on to the end.

(Testimony of Robert Sinclair.)

Mr. Barnett: Your Honor, it is elementary. It goes to [97] the explanation for total operating expense.

The Court: I think the answer may remain. I will let it go at that.

Mr. Barnett: Q. Mr. Sinclair, will you look at those work sheets that you have?

A. These?

Mr. Barnett: Yes. May I have one of those, Mr. Bailiff, please.

(Paper handed to Mr. Barnett.)

Q. Now, these work sheets are entitled "Daily Truck Report." Then appears a printed designation, "Date." Then printed "Truck Number," "Hours Worked," "Hours Down," "Truckloads," "Shovel Number." Then below that is printed "Cause for Delay." Then immediately under that appears the printed matter "Gasoline, Motor Oils, Transmission Oils, Hoist Oils, Chain Oils, Condition of Truck, Repairs Needed." Now, was it the customary practice that after each trip the driver would fill in the blanks provided for those things that required attention?

A. After each shift.

Q. And after the designation, "Condition of Truck," I notice in some of these appears the word, "O. K." Then in others appears no comment at all, and in a few of them—I don't seem to have one here. Do you happen to have one there

(Testimony of Robert Sinclair.)

in your hand that has some other designation after the words "Condition of Truck"?

(Paper handed to Mr. Barnett.)

Q. (Continuing): In others appear the designation, such as the one I am reading from, "Brakes adjusted." Where there is no comment in any of these, Mr. Sinclair, would that mean anything?

Mr. Schell: Just a moment. That will be objected to as calling for the conclusion of the witness as to what was in the driver's mind by failure to say anything. [98]

The Court: I don't think it is objectionable. I think we all know what the situation would be. If there was no comment there was nothing expected to be wrong with the truck.

Mr. Barnett: That is all we are asking here.

Q. Will you answer that, please?

A. (Writing): Evidently that truck was O. K.  
(Answer read by Mr. Barnett.)

Q. In the absence of any writing behind the designation "Condition of Truck," the truck was O. K.?      A. Yes.

Q. Now, counsel has called your attention to the fact, if it be a fact, that on the 9th of December, and on the 16th of December, and other days, trucks 11, 22, 33 and 44 worked less than—I will strike that; worked three and a half hours, and other smaller number of hours. Would you explain to the jury how that came up?



(Testimony of Robert Sinclair.)

A. (Writing): Mr. Birch's foreman told us at the beginning of each shift told us how many of our trucks he could use. We were continually arguing with Mr. Birch and complaining because he only once, on December 9th, said "All four trucks." He would sometimes remove our truck at the half shift and put our driver on some other truck.

Q. You were only paid for the actual number of hours that your truck worked, is that correct?

A. Yes, sir.

Q. "Yes, sir." At the time that you first went to work there were there any Macco trucks on the job?

A. No, sir.

Q. When did they come on the job, if you know?

A. (Writing): After January 16th.

Q. That is after your services were terminated?

A. Yes, sir.

Q. In referring to the amount of net profit which you made, you were asked whether or not you took into consideration social security and compensation insurance. I will ask you now [99] whether or not those two items were included in the \$1.42 which was paid by Macco in addition to the \$2.70?

A. (Writing): I understood at the time of the contract that Macco was to pay driving, and also s. s.

(Answer read by Mr. Barnett.)

Q. Is that "s. s." for "social security"?

(Testimony of Robert Sinclair.)

Mr. Schell: I move to strike the answer. It is a conclusion of the witness.

The Court: Objection sustained. The answer is stricken.

Mr. Barnett: Q. Was that told to you by anyone?

A. (Writing): Mr. Wells said Macco would take care of the drivers' wages.

(Answer read by Mr. Barnett.)

Q. Do you know what was paid for drivers per hour at that time? Do you know what the rate was?

A. (Writing): I believe it was \$9.00 for seven hours.

Q. You stated on cross examination that you did not believe that the trucks decreased in value, but increased in value. Would you state to the jury, or explain to the jury how you came to that conclusion?

A. (Writing): The trucks did not have headlights or windshields or tail lights or cab shields when we got them. We installed all of these.

Q. What were the condition of the tires—withdraw that. Did you purchase any new tires for your trucks?

A. We purchased five spares.

Q. I notice in one of these work sheets, Mr. Sinclair, after the designation "Signed" appears "R. Sinclair." Is that you? A. No, sir.

Q. Someone else by that name, is that true?

(Testimony of Robert Sinclair.)

A. Yes, sir.

Q. Do you know whether or not Mr. Farr was paid for any time [100] that he actually drove any trucks?

A. (Writing): He was not paid.

(Answer read by Mr. Barnett.)

Mr. Barnett: That is all, your Honor.

### Recross Examination

Mr. Schell: Q. As far as driving, that was a service you rendered in connection with your business when a driver didn't show up?

A. It turned out that way.

Q. By the way, neither one of you belong to the union, do you?

Mr. Barnett: Your Honor, I will object to that.

Mr. Schell: I think that is material as far as personal time is concerned as a driver.

The Court: I think he may answer.

A. (Writing): I belonged to Local 490, Vallejo, but I was behind in dues. Mr. Farr had made application to 490, but had not been initiated.

Mr. Schell: Q. You didn't transfer down to San Francisco?

A. (Writing): I tried. I asked Mr. Wells if he would advance the money to pay my back dues out of our earnings, but he refused to do so.

(Answer read by Mr. Schell.)

Q. Mr. Sinclair, truck No. 11—withdraw that, if the Court please. Have you made a list at all

(Testimony of Robert Sinclair.)

of the various notations about trouble with the trucks that are included in all those different slips you had?       A. No.

Q. Truck 33 broke an axle, did it not?

A. It might have.

Q. And it broke a transmission shaft?

A. (Writing): I don't know, sir. [101]

Q. And it broke a spring?

A. (Writing): I don't know.

Q. It had to have one rear wheel repaired?

A. (Writing): That's right, yes, sir.

Q. And you had to have something done to the transmission because the gears stuck, didn't you?

A. No, sir.

Q. One of the trucks had to have a new rear axle put in?

A. (Writing): I don't know.

Q. Would you call those things improvements?

A. No, sir.

Q. Now, Mr. Sinclair, at no time from December 1st up to and including April 16th, 1941, did you or Mr. Farr, or the firm of Farr and Sinclair, have a city carrier's permit from the Railroad Commission of the State of California?

A. No, sir.

Q. You had had a permit with Thomas Bowlin from October 21st, 1940, to November 15th, 1940, at which time it was revoked, isn't that true?

Mr. Barnett: I will make the objection it is incompetent, irrelevant and immaterial.

(Testimony of Robert Sinclair.)

The Court: Objection sustained.

Mr. Schell: That is all, your Honor.

Mr. Barnett: No further questions, your Honor. I will question Mr. Young, your Honor, and then the plaintiff will rest. Mr. Young, please.

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FRANK YOUNG,

Recalled for the Plaintiffs; Previously sworn.

Direct Examination

(Resumed)

Mr. Barnett: Q. Mr. Young, we are interested in how much you sold these trucks for?

A. I sold them for \$2,000.

Q. How much do Farr and Sinclair, according to your records, owe you? A. \$1,500. [102]

Q. I don't recall if I asked you yesterday or not if you had received any payment under this assignment from Macco Construction Company?

A. I have not.

Mr. Barnett: That's all.

Mr. Schell: Just a minute.

Cross Examination

Mr. Schell: Q. When you sold the trucks, to whom did you sell them?

A. To Weaver Motor Company. In fact, I traded them in on other trucks.

Q. Were the trucks worth less when you sold

(Testimony of Frank Young.)

them the second time than when you sold them to Farr and Sinclair?

A. I couldn't say whether they were or not. I don't know.

Q. By the way, did you have to tow those trucks to get them into your shop?

A. I believe there was one towed in on account of not having a battery.

Mr. Schell: That is all.

Mr. Barnett: That is all.

Mr. O'Neill: May I ask the witness a question to straighten out a matter?

The Court: Yes, if there is no objection.

Mr. Schell: No objection.

Mr. O'Neill: Q. Mr. Young, you stated in response to counsel's question, as I understood you, that you figured they owed \$1,500. A. Yes.

Q. You arrived at that, did you not, by taking the contract price of \$3,500, subtracting \$2,000 which you received on the sale, leaving a balance of \$1,500? A. Yes, sir.

Mr. O'Neill: That is all.

Mr. Barnett: Plaintiff will rest, your Honor.

[103]

The Court: Ladies and gentlemen of the jury, you are excused now until 2 o'clock, and please observe the former instructions given you by the Court. You may retire until 2 o'clock.

(Thereupon a recess was taken until 2 o'clock P. M. of the same day.) [104]

Friday, March 6th, 1942, 2 o'clock P. M.

Mr. Barnett: If your Honor please, I am asking your Honor's permission to reopen the plaintiffs' case for the limited purpose of offering a document in evidence which purports to be filed with the Railroad Commission, December 5th, 1940, and subsequently delivered to Mr. Sinclair. I don't believe there is any objection to this offer.

Mr. Schell: May I see it for a moment? I don't think there is any objection, but may I see it for a moment?

(Paper handed to Mr. Schell.)

Mr. Schell: We have no objection. It is stipulated in this letter of transmittal in connection with the permit, counsel has stipulated that no permit was applied for.

Mr. Barnett: There was an application, but the application was subsequently withdrawn. This was filled in in December, and the application was subsequently withdrawn, and this document which was filed with the Railroad Commission, consisting of a letter, as well as an insurance policy, was given by the Railroad Commission to Mr. Farr, and the application was withdrawn.

Mr. Schell: We will stipulate no permit was ever issued.

Mr. Barnett: No, no permit was ever issued. We offer that as plaintiffs' exhibit, and the plaintiff can now rest.

The Court: The case can be reopened by stipulation that this document was received.

Mr. Schell: We will stipulate he may reopen the case for the purpose of offering that document.

The Court: The document is received by stipulation. Plaintiff now closes its case. [105]

(Letter dated December 4th, 1940, and insurance policy attached thereto marked "Plaintiffs' Exhibit No. 5.")

Mr. Schell: Now, I file a separate motion.

The Court: Motion denied. Proceed.

Mr. Schell: Mr. Gerhart, please.

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J. R. GERHART

called for the Defendants; Sworn.

The Clerk: Q. Will you state your name to the Court and jury? A. J. R. Gerhart.

Mr. Schell: Q. What is your occupation, Mr. Gerhart?

A. Secretary-treasurer and business manager of the Building Material Drivers' Union.

Q. Is that union in San Francisco?

A. It is.

Q. The Building Material Drivers' Union has jurisdiction over the members, the people that drive dump trucks? A. Yes, it does.

Q. Was that so in the period of December and January—December of 1940 and January of 1941?

A. Yes.

Q. Through your office did you send out drivers for work on dump trucks? A. We do.



(Testimony of J. R. Gerhart.)

Q. Are you familiar with the job that was done, known as the Bethlehem Steel job that was going on in December of 1940 and January of 1941?

A. Yes, it was a job—yes, I am.

Q. Did you furnish drivers for dump trucks on that job?      A. I did.

Q. That is, through the union in your official capacity with the union?      A. Yes, I did.

Q. Did you furnish any drivers—withdraw that. Were you familiar with the Farr and Sinclair trucks that were on that [106] job?

A. I am familiar with all of the trucks that were on the job. There may be some that I just couldn't recall to memory. We had trucks in from Napa, and we had trucks in from——

The Court: Just confine yourself to the Farr and Sinclair trucks.

A. The Farr and Sinclair trucks were Autocars—I believe four of them.

Mr. Schell: Q. Four Autocar dump trucks?

A. Yes, sir.

Q. Did you send any drivers for the operation of those trucks?      A. Yes.

Q. State whether or not you had any difficulty obtaining drivers for those trucks.

Mr. Barnett: Just a moment. We will object to that question on the ground it is incompetent, irrelevant and immaterial, and no proper foundation has been laid, and based on hearsay.

(Testimony of J. R. Gerhart.)

The Court: No, I think I will overrule the objection. He may answer.

A. What was the question?

Mr. Schell: May the reporter read back the question?

The Court: The reporter will read the question.

(Question read.)

A. I did.

Mr. Barnett: And further, calling for the conclusion of the witness.

The Court: Objection overruled.

Mr. Schell: Q. What difficulty did you have in that regard, Mr. Gerhart?

Mr. Barnett: The same objection, your Honor.

[107]

The Court: Objection overruled.

A. The question was, what difficulties did I have?

Mr. Schell: Yes.

A. The drivers objected to going on the trucks because they were not sure, due to the condition, how long they would be able to operate them. We work on a half and a whole day basis, and the men work in several shifts.

Mr. Barnett: I ask the answer be stricken out as based on hearsay and not made in the presence of either of the plaintiffs.

The Court: Objection overruled.

Mr. Schell: You may cross examine.

(Testimony of J. R. Gerhart.)

Cross Examination

Mr. Barnett: Q. You receive a salary, do you, from this union? A. I do.

Q. Is either Farr or Sinclair a member of your union? A. Yes, sir.

Q. Do you know who paid your drivers for the work that they were doing?

A. Macco Construction Company.

Q. Are they ones that asked you to send the drivers out? A. They were.

Q. Do you still do business with Macco Construction Company? A. We do.

Q. How many drivers did you send out during the period from December 9th to April 16th?

A. That would be hard to say. Macco's record would show.

Q. Well, approximately?

A. That would be hard to state. We had calls for drivers to go on and men turned the jobs down and wouldn't take the jobs.

Mr. Barnett: That is, the Macco job.

A. For the Sinclair trucks. [108]

Q. Do you remember the date that this occurred? A. What was that?

Q. Do you remember the date that this occurred?

A. No, I have no way of knowing. We don't keep a record of the dates that our men are sent to the jobs. We send them, and they get work for one day or they get work indefinitely.

(Testimony of J. R. Gerhart.)

Q. Did Macco furnish all the drivers for all the trucks on this job?

A. To the best of my knowledge.

Q. Do you remember any of the other trucks on the job?

A. Yes, there was a man from Sunnyvale.

Q. Pardon me?

A. There was one from Sunnyvale. I don't recall the contractor's name. We paid little attention to that because the drivers were hired through Macco. Those coming from the outside, they were allowed to bring a driver for each piece of equipment provided they were members of the particular union from the territory in which they resided.

Q. Who allowed that?

A. That is by agreement between local unions in Northern California.

Q. The union allowed the owner of a truck to bring one driver, is that true?

A. That is true.

Q. Did I understand you, Mr. Gerhart, and did you mean to convey to his Honor and to this jury, that when Macco would phone for a driver or drivers they would tell you what equipment that driver was to be on?

A. Yes.

Q. That is true?

A. Yes, that is true.

Q. What equipment did the Hayward Company have?

(Testimony of J. R. Gerhart.)

A. Autocars; no, not Autocars. They had, I believe, some Internationals. I am not positive of that. That has been quite some time ago. There was many different kinds of equipment on the job. [109]

Q. What other makes? You explained specifically about the Autocars and the Internationals. Now, what other makes?

A. Macks and Whites. I am not certain of the type of equipment the Hayward Company operates, but I have seen equipment both on Macco's job and on Treasure Island.

Q. Have you ever seen the Farr and Sinclair equipment? A. Yes.

Q. When was that?

A. That was part of the time while it was working on the Bethlehem job of Macco's; and part of the time while it was standing on the job.

Q. Was that standing in November, December, January, February or March?

A. I imagine it was around that time.

Q. What year?

A. About two years ago, I should judge.

Q. Do you know how many trucks Macco had operating during that period?

A. No, I wouldn't. You mean his own and hired?

Q. I mean the total number of trucks.

A. I wouldn't know.

Q. You have no idea of the total number of drivers furnished? A. No.

(Testimony of J. R. Gerhart.)

Mr. Barnett: That is all.

Mr. Schell: That is all.

Mr. Crawford, please.

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FRED CRAWFORD,

called for the Defendants; Sworn.

The Clerk: Will you please state your name to the Court and jury.      A. Fred Crawford.

Mr. Schell: Q. Keep your voice up, Mr. Crawford, so we can hear you, please. Now, what is your occupation? [110]      A. Truck driver.

Q. By whom are you employed now?

A. Macco Construction Company.

Q. How long have you been operating trucks?

A. About 20 years.

Q. Did you work down on the Bethlehem job in December of 1940?      A. Yes.

Q. Do you know the Farr and Sinclair trucks, the Autocar dump trucks?      A. Yes.

Q. Did you ever drive one?

A. I drove one one day.

Q. When was that?      A. The first day.

Q. Did you drive it thereafter?      A. No.

Q. Why not?

A. No good; I wouldn't drive them.

Q. Why wouldn't you drive them?

A. Well, they just was in my estimation unsafe for me to drive. They might be safe for some fellows, but I didn't think so.

(Testimony of Fred Crawford.)

Q. In what regard were they unsafe?

A. There were no shields over them, no protection in driving. The brakes might hold and might not, and you had to be up in there to kind of hold them, and with the shovel swinging around with the dirt you are liable to get hit on the head.

Q. How were the operations otherwise? For instance, when you dumped how were they?

Mr. Barnett: Just a moment, your Honor. I make the objection that this witness drove one truck on one day. The question now is as to the operations of the trucks. The objection is based on the ground that the proper foundation has not been laid.

Mr. Schell: I think the objection is well taken.

Q. How about this particular truck, so far as the hoisting and dumping of material was concerned? [111]

A. It would hoist all right if you didn't have too big a load to rear up on you.

Q. It would do what?

A. It would rear up. The load would kind of hang up if you wasn't pretty careful with them.

Q. Did you see the other—withdraw that. Did you continue to drive down there on that job thereafter? A. Yes.

Q. You will have to answer audibly.

A. What is that?

Q. You will have to answer out loud.

A. Yes, I drove the rest of the job down there.

(Testimony of Fred Crawford.)

Q. What kind of trucks did you drive there-after?

A. Oh, Macks, Internationals and Sterlings.

Q. Did you see these trucks, these Autocar dump trucks from time to time on the job?

A. Yes, I seen them there.

Q. Did you notice whether or not they were frequently broken down?

A. Well, yes, they were in the shop quite a little bit.

Mr. Schell: Take the witness.

#### Cross Examination

Mr. Barnett: Q. Where do you work now, Mr. Crawford?

A. For Macco Construction Company over in Oakland.

Q. Who have you talked to about this case?

A. The attorney.

Q. When?

A. The day before yesterday, I guess was the first time I did.

Q. What did he say, and what did you say?

A. He just asked me if I drove the trucks down there, and I said yes, I drove them one day.

Q. How long that day?

A. An hour and a half of a full day. [112]

Q. Are you familiar with those little pink slips, those work slips? A. Yes.

Mr. Barnett: Mr. Bailiff, would you hand those to the witness?

(Papers handed to witness.)



(Testimony of Fred Crawford.)

Q. What is, or what was the purpose of those slips?      A. These here (indicating).

Q. Yes.

A. Well, it is the date, the number of hours worked, hours down, how many loads you made, and shovel number.

Q. Is it customary for you drivers to fill out those slips?      A. Yes.

Q. What do you do with them?

A. Turn them in to the office.

Q. Did you fill out one on this occasion, the occasion that you drove this one truck for an hour and a half?

A. Well, I made out a time card.

Q. I ask you now, Mr. Witness, if you filled out a pink slip similar to the one you have in your hand?

A. I wouldn't know because they change—no, I wouldn't think so, because I think they changed the forms afterwards. They had a different system the first day.

Q. Were you driving for Macco and Company, and they assigned you to drive one of these Farr and Sinclair trucks?      A. Yes.

Q. Who was the one that assigned you to that job?      A. Burch, the foreman.

Q. Who was Burch?

A. He was foreman of the Macco.

Q. Foreman of the Macco Construction Company?      A. Yes.

(Testimony of Fred Crawford.)

Q. Did you know what truck you were going to drive prior to the time you were assigned to it?

A. Not any particular num- [113] ber. He says, "You drive one of Farr and Sinclair's trucks."

Q. When did he so inform you?

A. When you got on the shift.

Q. About how long after you came on the shift?

A. After I came on?

Q. In other words, suppose the shift started at 7 o'clock; when would you know what truck you were going to drive?

A. Maybe 10 or 12 minutes before, if your regular truck was not broke down.

Q. That would be the time, is that correct?

A. That would be the time, yes. Sometimes it would be 7 o'clock; maybe right on time, or maybe a few minutes after.

Q. But the assignment was made with your arrival on the shift, is that correct? A. Yes.

Q. You were sent out there by the union, were you? A. Yes.

Mr. Barnett: That's all.

#### Redirect Examination

Mr. Schell: Q. You say you got an hour and a half in on the whole shift. What was wrong the rest of the time; why didn't you work the rest of the time? A. It was in the shop.

Mr. Schell: That is all. Mr. Meinn, please.

LOUIS MEINN

Called for the Defendants; Sworn.

The Clerk: Will you state your name to the Court and jury?      A. Louis Meinn.

Mr. Schell: Q. What is your occupation?

A. Truck driver.

Q. By whom are you employed now?

A. Macco Construction Company.

Q. Have you ever worked down on the Bethlehem job? [114]      A. Yes, sir.

Q. When did you work down there?

A. Oh, I went to work in January of 1941.

Q. You went to work in January of 1941?

A. Yes.

Q. Are you familiar with the Farr and Sinclair trucks that were down there?

A. When I went down there the union sent me down there, and I went down there and saw the foreman, and he said, "Yes, I can put you on this afternoon," so he took me down and showed me these Autocars, and I looked at the Autocars and I didn't know whether to go to work or not. It was in the heart of the winter time, and I was not working very steadily, so I thought I would take them for a day.

Q. Did you drive one for a day?

A. I drove one for a day.

Q. Have you driven one since?

A. Not since.

Q. What is the reason why you haven't driven one since?

(Testimony of Louis Meinn.)

A. Well, there was so much trouble the first day I drove it, you would get under the shovel and you couldn't get out because the motor would die. When you would start out the motor would die most of the time, and you would have to get out and crank it. So I thought one day would be enough for me.

Mr. Schell: That's all.

Cross Examination

Mr. Barnett: Q. Mr. Meinn, how long have you worked for Macco?

A. How long have I worked for Macco altogether?

Q. Yes.

A. I would say about four years off and on.

Q. You are working for them now?

A. I am working for them now.

Q. Who have you discussed this case with?

A. I have never discussed it with anybody except that they told me that they [115] wanted me down here as a witness.

Q. You know what I mean by discussing—talking about it?      A. Talking, yes.

Q. Did I understand you to say that you haven't talked about this case?

A. The only person I talked about this case to was Tucker, and he told me he wanted me for a witness on them Autocars.

Mr. Barnett: That's all.

Mr. Schell: That's all. Mr. Carlson, please.

OSCAR CARLSON

Called for the Defendants; Sworn.

The Clerk: Will you state your name to the Court and jury?      A. Oscar Carlson.

Mr. Schell: Q. What is your business or occupation?      A. I am a truck driver.

Q. Who are you working for now?

A. Macco Construction Company.

Q. Did you work down on the Bethlehem job?

A. I did.

Q. As a truck driver?      A. Yes, sir.

Q. Are you familiar with the Farr and Sinclair trucks that were down there?      A. Yes.

Q. Autocar trucks?      A. Yes.

Q. Did you ever drive one?      A. No.

Q. Have you ever seen them operate?

A. I did.

Q. What did you notice about their condition?

A. Well, not so hot.

Q. When you say not so hot, what do you mean? What condition were they in, Mr. Carlson?

Mr. Barnett: Your Honor, I will object to that. This witness hasn't driven one. There is no testimony he ever looked [116] at one or inspected one.

The Court: Objection sustained. The last answer is stricken.

Mr. Schell: Q. Did you observe the Autocars, Mr. Carlson, in their operations?      A. I did.

Q. Many times?

A. I was working right alongside of them.

Q. You were working right alongside of them?

(Testimony of Oscar Carlson.)

A. Yes.

Q. Did you see whether or not they were worked constantly or otherwise?

A. I thought they was a bunch of cherry pickers on them first, but I found after——

Mr. Barnett: I ask that answer be stricken.

The Court: Stricken out.

Mr. Schell: Just answer the question.

Q. Did you observe their operations as to whether they operated well or not?

A. Well, there was one hill you had to come down. They was hauling from the upper shuttle. They had to come down a ramp. The rest of us truck drivers, we had to give them the right-of-way. That is the only thing. And then on the dump, they was kind of ticklish there.

Q. In what respect?

A. They had so much overhang that they had to have a load dumped on, or they would rear up in the front, stand up on their back wheels.

Q. Did you observe whether or not they broke down?

A. Yes, they was delayed quite a bit.

Q. Were you ever asked to drive one of these trucks?      A. I was.

Q. Did you drive it?

A. I heard I was going to be asked.

Mr. Barnett: I will object to that.

The Court: Objection sustained.

Mr. Schell: Q. Did you ever refuse to drive one of those trucks? [117]

(Testimony of Oscar Carlson.)

Mr. Barnett: Same objection, your Honor.

The Court: Objection sustained.

Mr. Schell: That's all.

Mr. Barnett: No questions.

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JOHN KEENAN,

Called for the Defendants; sworn.

The Clerk: Q. Will you state your name to the Court and jury? A. Johnny Keenan.

Mr. Schell: Q. What is your occupation?

A. Truck driver.

Q. How long have you been a truck driver?

A. I drove for Granfield for 14 years steadily, and I drove a year since they dissolved partnership.

Q. Did you work down at the Bethlehem job, San Francisco, in December or January of last year?

A. I worked in January, three weeks, last year.

Q. While you were there were there some Auto-car dump trucks of Farr and Sinclair down there?

A. Yes, there were.

Q. Did you observe those trucks as you were down there on the job? A. Yes, I did.

Q. What observation did you make of them?

A. Well, I was out of employment, and I was looking for a job, and I kind of watched all the contractors' trucks that were there, trying to pick

(Testimony of John Keenan.)

out one to get established on. I didn't pay much attention to those trucks because they were kind obsolete.

Q. Did you ever drive one of them yourself?

A. No, I never have.

Q. Did you observe them as they were operating out there?           A. Yes, I did.

Q. What did you observe about them?

A. I watched the fellows. [118] They couldn't make a living on them. They would work two or three hours a day and break down, and when they would come to work on the shift they wouldn't have a truck. That was the main thing I was particularly interested in.

Mr. Barnett: I move to strike the answer as a conclusion of the witness and not responsive.

The Court: Stricken out.

Mr. Schell: Take the witness.

Mr. Barnett: No questions.

Mr. Schell: May these witnesses be excused now?

The Court: I am not interested in them.

Mr. Schell: All right, you may all go if you wish. Mr. Burch?

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### ARTHUR BURCH,

Called for the Defendants; sworn.

The Clerk: Will you state your name to the Court and jury?           A. Arthur Burch.



(Testimony of Arthur Burch.)

Mr. Schell: Q. Mr. Burch, where do you live now? A. In Houston, Texas.

Q. By whom are you employed?

A. Macco Construction Company.

Q. By whom were you employed in December and January of last year?

A. Macco Construction Company.

Q. In what capacity were you working for them? A. Foreman.

Q. Where were you working?

A. Bethlehem Steel.

Q. When did the excavation start down there—about?

A. I believe it was on around, about the 9th of December.

Q. On that first day did you have any records of trucks that the drivers made out?

A. No, I believe we didn't.

Q. They came later? A. Yes. [119]

Q. At the time when you first started the job did you observe the Farr and Sinclair trucks down there? A. Before they started the job?

Q. Assuming it was the 9th of December, were the Farr and Sinclair trucks there that day?

A. Yes, sir.

Q. How many were there? A. Four.

Q. Did they operate on that day?

A. Part of the day.

Q. Was there a steam shovel or a power shovel down there? A. Yes, sir.

(Testimony of Arthur Burch.)

Q. Loading those trucks? A. That's right.

Q. You say that they operated part of the day.  
Did your shovel operate all day? A. Yes, sir.

Q. What did you observe about those trucks?

A. They were not in shape to go to work.

Q. What did you notice in that regard?

A. That the material, that is, hose connections and fan belts, wiring, and one thing another, was rotted out.

Q. Did you have a conversation with either Mr. Farr or Mr. Sinclair about that on that day?

A. Yes, sir.

Q. With whom did you have the conversation?

A. I forget if it was either one or both of them.  
I think it was Mr. Farr.

Q. State in substance what you said to him and what that conversation was.

A. I told him that the trucks were not in shape and that we couldn't use them in the condition they were in.

Q. What did he say?

A. He said they were going to work on them and try to get them in shape.

Q. Did you then say anything more?

A. I don't remember saying any more at that time, no.

Q. Did the trucks work then the following day?

A. No, sir.

Q. How long was it before they worked again?

(Testimony of Arthur Burch.)

A. Several days. I forget now just how long it was. It was quite a little while.

Q. During that time, say—withdraw that. The job started on a Monday? A. Yes, sir.

Q. That was a five-day week job at first?

A. Yes.

Q. You worked that week. Now, did you have any further conversation with Mr. Farr or Mr. Sinclair about these trucks? A. Yes, I did.

Q. When was the next conversation, if you remember?

A. Well, it was perhaps a day or two later.

Q. Where did that conversation take place?

A. Well, in the shop.

Q. What was that conversation?

A. Well, they asked me when I was going to let them go back to work, and I told them I didn't know, that I didn't think they were going to work because they were all done.

Q. What did they say?

A. They said they had been working on them and got them back in shape.

Q. Did you say anything more?

A. I think a day or so later they asked me about it again, and I said I would take it up with Mr. Wells and see if they could go back.

Q. Then, did you tell them later they could?

A. Yes, sir.

Q. And did they go back? A. Yes, sir.

Q. What did you observe about the trucks after that?

(Testimony of Arthur Burch.)

A. Well, that they still was not the right kind of equipment for that job under the circumstances.

Q. In what respect?

A. Well, a hill like we had to go down, they didn't have sufficient brakes, I didn't think, for it, and they were dangerous; and they were not standing up like they should. [121]

Q. Now, in this type of work you were doing down there, were you running trucks in such a manner that one followed after *the at* the shovel?

A. Yes.

Q. Did the fact that those trucks couldn't operate on account of the Farr and Sinclair trucks cause any trouble?

A. Yes, sir.

Mr. Barnett: I am going to object to that as leading and suggestive.

Mr. Schell: Q. What effect did the breakdown of a truck have upon your operations?

A. It would cause a delay at the shovel because the shovel had to wait.

Q. Did you go to Farr and Sinclair about the condition of the trucks after they had got back to work this next time?

A. I don't remember now, but I think I did. I told them that they weren't—they still weren't what they should be.

Q. What did they say?

A. That they were fixing them up. They thought they could keep three out of the four running.

Q. Did they operate all the time; for instance,

(Testimony of Arthur Burch.)

when the shovel was operating were they always in working condition?

A. No, they didn't. They were not always in working condition.

Q. Did you have any further conversation with Farr and Sinclair about the condition of those trucks? A. Not that I remember.

Mr. Schell: That's all. Take the witness.

Cross Examination

Mr. Barnett: Your Honor, may I have the reports, the work reports, please?

(Papers passed to Mr. Barnett.)

Mr. Barnett: Q. Mr. Burch, do you know what these papers [122] are in Plaintiff's Exhibit 4?

A. I presume they are the time sheets.

Q. Would you look at those and tell me whether or not you had anything to do with them?

A. Yes, sir, this is the foreman's sheet that the drivers use for that time.

Q. On that job, is that correct?

A. Yes, sir.

Q. Have you ever driven any of these trucks that we are talking about? A. No, sir.

Q. Do you want us to understand that the reason these pieces were fired from the job is because the equipment was faulty? A. That's right.

Mr. Schell: We object to the question, and move the answer be stricken on the ground that the question is argumentative.

(Testimony of Arthur Burch.)

The Court: He said "Yes." Let the answer stand.

Mr. Barnett: Q. In regard to these work tags that were made out by your driver—that is true, isn't it?

A. The driver of the truck, yes, sir.

Q. And you furnished those drivers?

Mr. Schell: Just a moment. That is calling for a legal conclusion as to who furnished the drivers.

The Court: He can answer. This is cross examination. If he doesn't know he can say so.

A. If anybody was short of drivers he would have somebody call the hall for a driver.

Mr. Barnett: Q. Yes, and then you would assign the driver to not only Farr and Sinclair but other contractors on the job, is that true?

A. No, sir; that is not necessarily true. When Farr and Sinclair or any other truck owner wanted a driver, they might tell me or they might call themselves [123] or have somebody in the office call for a driver, and the driver would report to them.

Q. If they tell you, you would call the union and the union would send out a driver, is that not true? A. Yes, I think that is correct.

Q. Yes. Under this arrangement or agreement you were to pay Farr and Sinclair's drivers whatever amount you might have agreed with the drivers to pay, is that true?

A. I don't know just how that worked.

Q. You knew nothing about that? A. No.

(Testimony of Arthur Burch.)

Q. Did you have charge of assigning, each morning, trucks to each shift?

A. I would tell the truck owner how many trucks I needed; if I needed more or if I didn't.

Q. Do you have that discretion in telling what truck drivers were to work on that particular shift?

A. Not truck drivers, but I would tell the owners.

Q. That is what I mean. For example, how many trucks did you have on that job?

A. I don't remember just how many it was.

Q. For the purpose of demonstrating that only, assume you had 40 trucks on the job. You would select of that number of trucks those you wanted to work on a particular shift, and you would inform the truck operator or the truck owner of that, wouldn't you?

A. Yes, sir.

Q. In other words, you had in your discretion the right to determine who would and who would not work on a particular shift, isn't that true?

A. Yes, sir.

Mr. Barnett: That's all.

### Redirect Examination

Mr. Schell: One more question, if I may, please:

[124]

Q. Mr. Burch, at the time, during December and January did you need all the trucks that were available for your work?

A. Yes, sir.

Q. In other words, did you have work for all of

(Testimony of Arthur Burch.)

the trucks that were available at that time in operating condition?

A. I think we had, as near as I can remember.

Q. You had a good deal of rain that year, didn't you?

A. Yes, sir.

Mr. Schell: That's all.

#### Recross Examination

Mr. Barnett: Q. As a matter of fact, at first you had your own shovel up there, isn't that true?

A. Yes.

Q. Isn't it also true that on that occasion, or during the time you had your own shovel, you didn't have work for all of the trucks?

A. We didn't have all the trucks there at that time.

Q. You had Farr and Sinclair's trucks there?

A. Yes.

Q. And when you brought in a second shovel you had, naturally, more work for more trucks, isn't that true?

A. We brought in more trucks, yes.

Q. How many shovels did you have originally?

A. Two to start with.

Q. How many did you finally build up to?

A. Three shovels apiece.

Mr. Barnett: Three shovels apiece. That's all.

Mr. Schell: That's all. Mr. Tucker, please.



O. H. TUCKER

Called for the Defendants; sworn.

The Clerk: Will you state your name to the Court and jury. [125] A. O. H. Tucker.

Mr. Schell: Q. Mr. Tucker, what is your profession?

A. I am a civil engineer employed by the Macco Construction Company; as their field engineer during January and December—I mean during January and December until April I was assistant superintendent.

Q. You are talking now about December, 1940, and January of 1941? A. That's right.

Q. Did you work down there on the Bethlehem job?

A. I did. I went to work there on the 16th of December.

Q. Did you stay there until the end of the job?

A. I did.

Q. Did you know Mr. Farr and Mr. Sinclair?

A. I do.

Q. When did you first meet them?

A. At the Bethlehem Steel plant.

Q. What type of work was this job down there?

A. Excavation of a hill and the disposal of the material in a waste dump.

Q. Disposal of the material in a waste dump?

A. Yes, sir.

Q. How was the material moved from the hill?

A. It was loaded onto trucks by power shovels and hauled to a dump some 4000 feet from the hill.

(Testimony of O. H. Tucker.)

Q. Did you observe the Farr and Sinclair trucks on this job?      A. I did.

Q. How long have you been in the construction business?      A. Since 1926.

Q. And as such have you worked with trucks?

A. I have.

Q. What kind of trucks did Farr and Sinclair have down there?      A. Autocars.

Q. Did you ever take a look at the trucks?

A. Very closely.

Q. What did you observe about them?

A. I observed they were not a modern truck; they had open cabs; no protection [126] for the driver; that they did not have tail gates; they had what was known as a rock body, but the shut was not adequate, that is, sufficient.

Q. When you observed those trucks were you on the job watching the work going on?      A. Yes.

Q. Did you observe those trucks in operation?

A. I did.

Q. Did you notice whether or not they broke down?

A. They were on the job quite often.

Q. Mr. Tucker, in your position as assistant superintendent and engineer, were the records of Macco on that job kept under your direction and control?      A. They were.

Q. That was part of your duties?

A. Yes, sir.

(Testimony of O. H. Tucker.)

Q. Besides the Farr and Sinclair trucks, how many trucks did you have on the job?

A. The greatest number we had at any one time, I would say, was four or five.

Q. At the start of the job, how many did you have?      A. Approximately 30.

Q. By the time you came up there, was there more than one shovel working?

A. Two shovels were working.

Q. And later you had how many?

A. Three.

Q. Did you have other truck owners operating trucks on that project?      A. We did.

Q. Do you remember who else was working on that project?

A. There was the Sibley Truck & Grading Company. There was the Devincenzi Brothers. There was the Hayward Building Materials Company. There was A. Bronzatti of Walnut Creek, and F. Bronzatti of Walnut Creek. There was Nello Giorgi of San Francisco. There was Peter Suchez of San Francisco. There may have been one or two more. I would have to refer to my records if you want a complete list. [127]

Q. That will suffice for the moment. Did those people continue to work throughout the entire length of the job?

Mr. Barnett: We will object on the ground it is immaterial and has no bearing on the issues of this case.

(Testimony of O. H. Tucker.)

The Court: Objection sustained.

Mr. Schell: Q. Mr. Tucker, did you have any conversation with Mr. Farr or Mr. Sinclair prior to their leaving the work?

A. Several conversations.

Q. When was the first one?

A. Probably the first day I was on the job.

Q. Do you remember what that conversation was?

A. I imagine—no, the first day on the job, I wouldn't remember that, no.

Q. Do you remember talking to them at a later time? A. I talked to them several times.

Q. About what?

A. They were always wanting an advance, and I told them to check up the record and see if they had any money coming and if they did I would take it up with Mr. Wells. And the first time they had no money coming, and so I didn't take it up with Mr. Wells. A few weeks later they asked again, and I asked Mr.—

Mr. Barnett: If your Honor please, may we have the conversation that took place?

The Court: I don't consider this is competent.

Mr. Barnett: I was going to urge the objection on that.

The Court: The witness is stating the conversation about the advance. I don't know that that is an issue here.

Mr. Schell: I didn't want to lead the witness.

(Testimony of O. H. Tucker.)

Q. Did you have any conversation with them at any time about the condition of their trucks?

A. I did.

Q. When was that?

A. Approximately ten days before they were [128] told that their trucks were not any longer needed.

Q. Where did that conversation take place?

A. In the office.

Q. Who was present?

A. I think myself and Mr. Sinclair.

Q. What was the conversation?

A. At that particular time they wanted us to give them a purchase order so that they could obtain some parts to repair the trucks.

Q. What was the conversation?

A. The conversation went something like this: Mr. Sinclair asked me if he could get a purchase order to obtain parts, and I asked him how much it would be and he said not over \$10 or \$15. So I either wrote one myself or told the office man to write one for him.

Q. Was anything else said about the trucks or their condition at that time?

A. Nothing I would want to testify to on the stand.

The Court: What is that?

A. Since I have to repeat the conversation, I wouldn't swear that it would be right, sir.

Mr. Schell: Q. You mean that there were other general conversations that you don't remember?

(Testimony of O. H. Tucker.)

A. Yes, sir.

Q. Did you ever talk with Mr. Farr or Mr. Sinclair about their leaving the job?

A. Approximately a week before I remember a conversation, as I was just coming into the office, and Mr. Sinclair or Mr. Farr stopped me and asked me how much longer they would be on the job, and I said they won't be much longer. At that time I suggested that they contact Eaton & Smith, who had just been awarded a contract by Kaiser for work in Richmond.

Q. What was the reply?

A. The reply was they wanted to know how to get out and see them, and I gave them directions.

Q. At that time were other trucks laid off?

A. We had been laying trucks off——

Mr. Barnett: Objected to as incompetent, irrelevant and [129] immaterial as to the trucks.

Mr. Schell: I don't want to argue that, but——

The Court: There was some statement on your part in opening that there were many other trucks put on the job at this time.

Mr. Barnett: January 16th, your Honor, yes.

The Court: I think if that is competent, why, this also is. He may answer. Read the question.

(Question read.)

A. Could I refer to my records?

The Court: I am going to reverse myself on that. I don't think that is material. That would

(Testimony of O. H. Tucker.)

bring up the question of why they did that, and I don't want to go into that; and it would take the witness some time to find out, anyway. I will sustain the objection.

Mr. Schell: Q. Mr. Tucker, did you have any conversation with Mr. Farr or Mr. Sinclair about their laying off about the 16th of January?

A. About the 16th of January?

Q. Yes.

A. I don't recall one on the 16th of January. I recall one on the 18th of January when they were actually laid off.

Q. Where did that conversation take place?

A. Down on what is known as the Western Pacific dump, just off of Third Street.

Q. Is that where the material was being hauled?

A. That is where the dirt was being hauled, and Farr and Sinclair were using——. Farr and Sinclair had one corner of that spot they were using for a shop, and Sibley had another, and that took place in the spot Sinclair and Farr was using as a shop.

Q. That was not on the Bethlehem property?

A. No.

Q. Where was that conversation?

A. I drove up and told them [130] they were through at 3:30, I think it was.

Q. What did they say?

A. They shrugged their shoulders and said nothing.

(Testimony of O. H. Tucker.)

Q. Did you see them at a subsequent date?

A. About a week or ten days later they came into the office and wanted to check hours and the amount of money they had coming. Macco had prepared a statement for them, and I went over it with them and showed them how many hours they had worked and how much they had coming and what the documents were and what the net was, and they wanted to know if they could have it, and I said, "No, there was an assignment out and there was some outstanding bills that had been presented to us in their case."

Q. What did they say then?

A. They thanked me and went on out the door.

Q. Did they ever at any time say anything to you about having a contract with Macco for any specific period of time?      A. Never.

Q. Before they asked you, did they say anything about the correctness of this account?

A. I took it from their—they were satisfied that it was substantially correct and met with their approval.

Mr. Barnett: Your Honor, I will ask the answer go out as not being responsive.

The Court: It won't be stricken for that reason. It will be stricken because it is a conclusion of the witness. He is not testifying to any fact at all; merely as to how he took it as to what they believed.

Mr. Schell: Q. Was anything said, as near as



(Testimony of O. H. Tucker.)

you can remember, in substance in the conversation regarding that account?

A. Was anything said as to the correctness of the account? [131]

Q. Yes, that's right.

A. There was nothing said—there was nothing said about the incorrectness of the account.

Q. Now, Mr. Tucker, have you taken the records showing this—withdraw that, please. Did Macco keep records of the number of hours that the shovels worked on this job? A. They did.

Q. Do you have the information available as to the number of hours that the shovels worked, job hours worked on December 9th to the 18th of January?

A. I have that record—17-1/3 shifts—and a shift is 7 hours.

Q. The total number of hours—17-1/3 shifts?

A. I take that back. That is 17-1/3 days, and a day is 24 hours, so that is 364 hours.

Q. 364 hours that the job worked?

A. Yes, sir.

Q. Did you make any compilation as to how many hours each individual truck of Farr and Sinclair worked during that period of time?

A. I did.

Q. Now, there were 364 hours that the job worked, is that right? A. Yes.

Q. How many hours did truck No. 11 work?

Mr. Barnett: Your Honor, does there seem to

(Testimony of O. H. Tucker.)

be any dispute as to the total number of hours that the plaintiffs worked?

The Court: Well, proceed.

A. That is in your file.

Mr. Schell: What?

A. That is in your file?

Mr. Schell: May the bailiff take this up to the witness?

(Paper handed to the witness.)

Q. I think this is the one you were looking for.

A. Thank you. Truck 11 worked 129 hours.

Q. How many hours did truck 22 work?

A. 202 hours.

Q. And 33? A.  $157\frac{3}{4}$ . [132]

Q. And 44? A.  $108\frac{1}{4}$ .

Q.  $108\frac{1}{4}$ ? A. Yes, sir.

Q. Have you totaled them to determine how many hours worked by all the trucks was during that period? A. 597 hours— $597\frac{1}{2}$ .

Q. These others pertain to the work of Farr and Sinclair——

A. I might correct myself back there. At the time that Mr. Sinclair and I and Mr. Farr discussed the bill on December 9th, when the job first started, there were no records available, and an arbitrary 38 hours was agreed upon between ourselves as a fair number of hours to add to that day, and that 38 hours would have to be added to this total, making  $635\frac{1}{2}$  hours.

(Testimony of O. H. Tucker.)

Q. Did you keep a record of the gasoline that was used by Farr and Sinclair? A. I did.

Q. And the oil and grease? A. I did.

Q. And the drivers' compensation?

A. I did.

Q. And the total operating drivers' time and insurance? A. I did.

Q. And the mechanics and the insurance?

A. I did.

Q. And the—by the way, did you purchase any tires?

A. We purchased one tire for Farr and Sinclair.

Q. Did you purchase any parts?

A. A few minor parts.

Q. Did you keep a record of that?

A. We did.

Q. And then did you have invoices presented at your office for other parts? A. We did.

Q. And furnished to Farr and Sinclair?

A. Yes.

Q. Did you make some computations, Mr. Tucker, regarding the cost per hour of these various items? A. I did.

(Papers handed to witness.)

Q. What does that show—cost per hour of those various items? [133]

A. It shows that the cost per hour, per operated hour of gasoline was 44.7 cents; cost of oil and grease 14.6 cents.

Q. Not quite so fast.

(Testimony of O. H. Tucker.)

A. Gasoline was 44.7 cents, and oil and grease was 14.6 cents.

The Court: Haven't you got this in exhibit form?

Mr. Schell: I would be glad to offer that as an exhibit.

The Court: The witness is testifying from a typewritten document.

Mr. Barnett: I have no objection to this type of a stipulation, that he would repeat what was on that piece of paper, reserving, of course, the correctness of it and the authenticity of the document. But he would testify as it appears.

Mr. Schell: We will accept that, and we will offer that in evidence, if the court please.

The Court: On that stipulation it is admitted in evidence.

(“Cost of Operating Farr & Sinclair Trucks” marked “Defendants’ Exhibit A.”)

Mr. Schell: Q. In making the computation with those items of expense, I mean the cost of hourly operation, did you take anything at all for their time, for Farr and Sinclair’s time?

A. No, sir.

Q. Did you take any depreciation on tires, outside of that one tire you purchased?

A. No, sir.

Q. You just took that price as the tire depreciation, is that right? A. Yes, sir.

Q. Did you have any attachments served on you? A. We did.

(Testimony of O. H. Tucker.)

Mr. Barnett: Object to that as incompetent, irrelevant and immaterial. It has no bearing on this contract.

The Court: Objection sustained. I think that relates to other issues which are not here at present. I don't see any [134] other purpose for that.

Mr. Schell: I think possibly it is covered in this assignment, anyway, your Honor.

Mr. Barnett: If that is a fact, your Honor, I would ask the Court's permission to look at this instrument, which I stipulated may be admitted for the purpose of this witness saying what was on it, but if it has any immaterial matter on it I certainly object to that. Then counsel says it is covered by that—why I don't want to stipulate to that.

Mr. Schell: I didn't make myself clear. I was talking about bills——

The Court: If it is on here I can't find it.

Mr. Schell: It was rather an unfortunate remark by me. It didn't mean that.

Q. Did you observe the condition of the Farr and Sinclair trucks as they were operating?

A. I observed the trucks as they were operating, yes.

Q. State whether or not you had any difficulty obtaining drivers to operate those trucks?

A. That was a matter that Burch took care of.

Q. Mr. Burch took care of that?

A. Yes; my evidence would be hearsay.

Mr. Schell: That's all.

(Testimony of O. H. Tucker.)

Cross Examination

Mr. Barnett: Q. Mr. Tucker, in a way I am sorry I looked at this, but I anticipated and intended to ask you that that would show a loss, is that not correct?

A. Those are the facts.

Q. On your computation it is based on the time actually worked, [135] is that correct?

A. That's right.

Q. Did you take into consideration that if the contract had been permitted to continue for the full period we contend it was agreed upon, that is, 120 days, when you figured this computation——

A. Did I do what?

Q. Did you take into consideration what the result would be if the contract ran 120 days?

A. I checked the facts as they were up to that time. I am not making those conclusions. That is not a conclusion. I mean—I don't mean a conclusion—a supposition.

Mr. Schell: Mr. Barnett, I beg your pardon. I overlooked covering something, and perhaps it would be easier for you to go on with your cross examination if I could reopen the direct examination, if that is agreeable with counsel and the Court.

The Court: Counsel is examining. It is up to him.

Mr. Barnett: I would like to finish with this thought, and I will accede to your request.

(Testimony of O. H. Tucker.)

Q. Without arguing, Mr. Witness, what I have in mind is this: In making this computation, did you take into consideration the fact that this contract, had it ran 120 days, what the loss or profit might have been?

A. No, because there were certain other things that would not be included in there.

Q. You refer now to the work of Farr and Sinclair?

A. Yes, but I mean if I had made a statement, I mean my opinion of what the cost per hour of operating those trucks was, if the trucks had been on the 54 days that the job ran instead of the 17 that it did, why, I would have endeavored to estimate on the basis of my experience what those various items would be.

Q. Is it not a fact, Mr. Tucker, that on jobs of this type and character, when they start, when the contractors are getting [136] under way, they have certain initial expenses, and they don't know what they will be until after they get started, is that not a fact?

A. That is a fact in certain cases; but not in this.

Q. I anticipated that; but in this particular case, as far as Farr and Sinclair are concerned, that was not the fact, was it?

A. I was not present on the job until the 16th. I can only testify to what I know thereafter, after the 16th. At one time I pointed out to both Mr.

(Testimony of O. H. Tucker.)

Farr and Mr. Sinclair that their outside mechanics was running over a dollar an hour, and that was a good deal higher than the owner ought to pay for four trucks. I suggested to them at that time that they make arrangements with the union to either be allowed to do their own mechanical work or drive a truck in order that they could cut down their overtime. They were unable to do that, they told me several days later, saying that those arrangements could not be made, and they were forced to hire a trouble shooting mechanic at each shift.

Mr. Barnett: May I ask that the answer be stricken as not being responsive?

Mr. Schell: That was responsive. It was a general question, as I remember.

The Court: No, I will permit it to remain.

Mr. Barnett: Q. Now, you say ten days prior to the time this contract was terminated—that would be about January 8th—that you had a conversation with Mr. Sinclair or Mr. Farr relative to the expenditure of \$10 or \$15 for parts, is that correct?

A. I didn't say 10 days. I said several days before.

Q. I may be mistaken, but my notes indicate that ten days [137] before you told them the trucks were not needed. You had that conversation?

A. I couldn't testify to ten days—I would say several.



(Testimony of O. H. Tucker.)

Q. Getting back to the occasion when they asked you for \$10 or \$15—do you recall that?

A. Yes.

Q. According to your records how much money had they earned at that time?

A. I couldn't answer that now.

Q. Well, you were in charge of the records, weren't you?

A. Yes, sir, but I can't tell what their earnings are day by day. I can figure it out if the Court will grant a 15 minute recess.

Q. Well, his Honor will decide that, Mr. Witness. Let me ask you this: What is the total amount of money that these boys earned up to and including the 18th of January.

A. The total amount of money earned?

Q. Yes, sir.

A. The trucks earned \$1708.42, which is——

Q. Now, is there any way of determining of that seventeen hundred odd dollars how much had been earned approximately ten days before the services were terminated? Would you answer that yes or no, please.

A. If——

The Court: Wait a minute. I want to know first if that is gross?

A. Yes, sir, that is gross.

Mr. Barnett: Yes, that is what I asked, your Honor.

A. If I can add it up here within a few minutes——

(Testimony of O. H. Tucker.)

Mr. Schell: May the reporter read the question, your Honor? I think the answer is to be yes or no.

The Court: Read the question.

(Question read.)

A. Yes.

The Court: The answer is "Yes."

Mr. Barnett: Q. Could you do it please? [138]

The Court: No, I don't think I will permit that.

Mr. Barnett: Q. You say the dump was some four thousand feet from the hill, is that correct?

A. That's right.

Q. Can you tell me this, whether or not at the inception of this contract if the dump was on the Bethlehem property at the start of it?

A. At the start of the job?

Q. Yes.

A. At the start of the job there was a few thousand yards to be hauled onto the Bethlehem property, and the rest was to be hauled to waste dump.

Q. So that at the start of the project the dump was on the Bethlehem property?

A. That's right.

Q. You state that you had a conversation with Mr. Sinclair relative to the finding of other employment, and I recall, according to my notes, that you mentioned something about Eaton & Smith. They are contractors, is that not true?

A. That's right.

Q. Would it refresh your recollection, Mr. Tucker, if I stated that it is a fact that this con-

(Testimony of O. H. Tucker.)

versation relative to the securing of employment from Eaton & Smith took place after they were discharged by you?

A. I again—after they were discharged I reminded them again of the possibility of working at Eaton & Smith.

Q. You had two conversations, then, in which Eaton & Smith were mentioned? A. Yes, sir.

Q. However, you do admit that one of them took place after the termination of their services?

A. Either after or at the same time their services were terminated.

Q. Do you recall when the Macco trucks came on the job? A. I do. [139]

Q. What was the date, please?

A. On January 30th.

Q. They came from San Diego, is that correct?

A. Yes.

Q. Were they on the job there for some time?

A. They were on the job in San Diego for approximately from the 10th of Decemebr to just before the 30th of January.

Q. There has been introduced in evidence here. Mr. Witness, some pink slips known as work sheets. Are you familiar with them?

A. Yes, I have the originals of them right before me—the blue.

Q. Those are the green sheets you have there?

A. These are the blue ones.

Q. Have you had the opportunity of inspecting the pink ones? A. I have not.

(Testimony of O. H. Tucker.)

Q. Is it customary and is it your practice that the carbon should be between the green or blue one, as you call it, and the pink one?

A. No, there is a tissue paper intervening.

Q. And then there is a carbon, is that correct?

A. Yes, a double-faced carbon.

Q. And these pink slips are duplicates of the original?

A. They are really triplicates, yes, sir.

Q. What were your instructions to the drivers with reference to these work sheets; and I refer now to the Bethlehem job?

A. Our particular instructions were to show the truck number, the date they worked, the hours worked, the hours the truck was driven, the number of loads they hauled, who the truck was owned by, and their names. There was a space on there for the drivers to put down the condition of the truck and repairs needed. But we never gave them any instructions on that, because these were a form that we have used for our own [140] trucks, and those columns were for when we were operating our own trucks.

Q. You furnished these forms? A. Yes.

Q. You furnished the drivers?

A. The union furnished the drivers.

Q. You say the union furnished the drivers, but as far as Farr and Sinclair were concerned—and I don't want to quibble with you—but you paid the drivers? A. Sir?

(Testimony of O. H. Tucker.)

Q. You paid the drivers?

A. The drivers were carried on our payroll.

Q. Why, of course. Were these sheets used by you in any method for the computation of the amount of money paid to the drivers, or to Farr and Sinclair?

A. They were used for both purposes.

Q. They were records, in other words?

A. Yes.

Q. Is that correct?           A. Yes.

Mr. Barnett: That is all of the cross examination.

#### Redirect Examination

Mr. Schell: Q. This possibly may not be re-direct examination, but something I overlooked on direct. Mr. Tucker, how many actual working days did this job take?

A. 54—55-1/6 days.

Q. When was the work completed?

A. The work was completed on the 16th of April.

Q. During the——

A. I might correct myself. The mass production of the job was completed in 55-1/6 days. There was remaining after the 9th day of April 9018 yards of clean-up, and that took us, because of rain and slow conditions, it took us another eight days.

Q. But your mass hauling was completed—— [141]

(Testimony of O. H. Tucker.)

A. Our mass hauling was completed in 55-1/6 days, and our big shovels moved out.

Q. Now, how many days of those 55 did Farr and Sinclair operate? A. 17-1/3.

Q. 38 or 39 after they left, is that right?

A. Yes.

Q. When you say "so many days," that is so many days of 21 hours?

A. So many days of 21 hours each.

Q. You said in connection with cross examination that there were some other factors that you had to take into consideration in these costs—some additional costs.

A. Yes, for instance, that summary sheet with four trucks and 16 tires, there was only one tire charged in there. If a long time operation was considered, or even a 55 day operation your tire repairs—tire replacements and repairs would amount to more than is shown on that sheet.

Q. Did you take into consideration the time that Farr and Sinclair put in on that work?

A. It should be considered on a sheet that was prepared with that in mind.

Q. Was depreciation taken into consideration?

A. It wasn't.

Q. Now, you say that the hourly rate—I notice on there—you said something in your testimony about hourly rate for mechanics; you mean for a truck operated hour?

A. Yes, there was in addition to the carrying

(Testimony of O. H. Tucker.)

of the Farr and Sinclair drivers on the Macco payroll, we carried the Farr and Sinclair mechanics on our payroll, and the total money paid them divided by the number of hours the trucks worked gives you the hourly cost of mechanical services.

Q. In your work as engineer and assistant superintendent and other work you have done on construction, you have had something to do with cost accounting of jobs? [141-A] A. I do.

Q. When you are operating your own trucks you keep the cost accounting of that?

A. It is kept under my supervision.

Q. It is kept under your supervision?

A. Yes.

Mr. Schell: I think that is all.

#### Recross Examination

Mr. Barnett: Q. Mr. Tucker, you said that this job took 55 or 66 days for the mass production?

A. Right; that is right.

Q. However, you did not include a period of how many days for this cleaning up?

A. Eight days.

Q. Then, the job was actually completed in 63-1/6 days, is that correct.

A. That's correct.

Q. In the remaining eight days did you use any trucks?

A. I beg your pardon. I wish to correct myself. That 55-1/6 days is of 21 hours each, and the remaining 8 days—2 of them are 16 hours. How many did I say?—16?

(Testimony of O. H. Tucker.)

Q. Yes, sir.

A. Let's start all over. Of the remaining 8 days, 3 of them were all 8 hours, 6 of them were 16 hours, and two holidays.

Q. Now, I think you are getting too many days. Three for what?

A. Three for 8 hours, three for 16, and two for holidays.

Q. So that would make the total number of days 63-1/6, with the last 8 days for the hours you have indicated?

A. 5-1/6 days at 21 hours.

Q. And of the other 8 days, 3 were for 8 hours, 3 for 16 hours, and 2 for holidays, is that correct?

A. That is correct.

Q. Did you work on those days?

A. No; it is elapsed time is all I am referring to. [142]

Q. Well, I am referring to work days.

A. Yes, sir.

Q. Then, it would be only six more work days?

A. Yes, sir.

Q. Then you didn't go back on the job after that? A. No, sir.

Q. You state in your computation of the profits, if any, you did not take into consideration any depreciation? A. That's right.

Q. What is the reason for that?

A. I merely made up a record of what it cost to operate those trucks, of the known expenses, and that does not purport to be a cost sheet. That in-



(Testimony of O. H. Tucker.)

cludes any unknown factor, or any assumed factor.

Q. Depreciation is an unknown factor?

A. You have to assume or arbitrarily take some figure.

Q. One other question: You put into your computation a total amount of money paid to mechanics while Farr and Sinclair worked, is that right?

A. That is correct.

Q. You made no provision as a part of that amount was capital?

A. I wouldn't say; I wouldn't consider any item like capital.

Q. I am not asking you that, Mr. Witness. I merely asked you whether or not any part——

A. I would say no part of it was capital.

Q. You took all as operating expense?

A. Yes.

Mr. Barnett: That's all.

Mr. Schell: That's all.

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I state to the Court now that I have the deposition of Mr. Wells. Shall I read it now?

The Court: How many more witnesses do you have?

Mr. Schell: We have no more.

The Court: You may read it.

Mr. Schell: This is the deposition taken of Mr. Ben F. Wells, on July 16, 1941, in the office of Mr. Barnett at 111 [143] Sutter Street, San Francisco, California. I am reading from the copy. Maybe I should read it from the original, if there are any corrections.

“BEN F. WELLS,

one of the defendants, called as a witness on behalf of the plaintiffs, being first duly cautioned and sworn by the Notary Public to tell the truth, the whole truth, and nothing but the truth, testified as follows:

“Examination by Mr. Barnett

“Mr. Barnett: Q. What is your name, please?

“A. Ben F. Wells.

“Q. Where do you reside, please?

“A. 926 Powell Street.

“Q. By whom are you presently employed?

“A. Macco Construction Company.

“Q. In what capacity?

“A. Construction superintendent.

“Q. And how long have you occupied that position?

“A. Going on seven years.

“Q. Generally, Mr. Wells, what are your duties?

“A. Well, we take care—I take care of the construction jobs. I run them and operate the job.

“Q. By that, you mean you hire and fire employees? A. Yes, sir.

“Q. Make contracts for the work in connection with the jobs?

“A. Well, to a certain extent; just for ordinary verbal contracts, or something like that.

(Deposition of Ben. F. Wells.)

“Q. Well, you have the authority, I take it, to make verbal contracts in connection with certain jobs which are under your supervision? Is that correct?      A. That’s right.

“Mr. Schell: Just a moment. I will object to that as calling for a conclusion of this witness, and being too broad and indefinite, and move the answer, if there was one, go out [144] for the purpose of the objection.

“Mr. Barnett: Q. Well, as general superintendent, have you charge—I will withdraw that. Directing your attention to the subject matter of this controversy—and that is the Bethlehem Steel job—is that the way you designate it?      A. Yes.

“Q. You designate it in a way that you will know what we are talking about. Will you do that, please?      A. Yes.

“Q. What was the job?

“A. It was a dirt moving job at the Bethlehem Steel.

“Q. And where was the work to be done?

“A. Well, it would be about 20th and Illinois.

“Q. In this City and County?

“A. Yes, sir.

“Q. And about how much dirt was involved?

“A. Around 600,000 yards.

“Q. Now, did you have anything to do with the securing of that contract?

(Deposition of Ben. F. Wells.)

“A. Well, no, I didn’t. We have engineers, and they do the figuring on the job—make out the estimates.

“Q. Did you participate at all in the estimates?

“A. How do you mean? Making up the estimates?

“Q. Yes.

“A. I don’t recall whether I did on this job or not.

“Q. You don’t recall whether you did or not? A. No, I don’t.

“Q. Did you have anything to do with designating the type of equipment to be used on the job? A. Oh, yes.

“Mr. Barnett: Just a minute. Off record.

“(Short intermission.)

“Mr. Barnett: Will you read the last question?

“(Last question and answer read.)

“Q. Well, now, that was part of your job, your duty, to ascertain the nature and type, as well as quality, of equipment [145] to be used in connection with this particular job? Isn’t that true? A. Yes.

“Q. And you made agreements or contracts for the use of such equipment as, in your opinion, would do the work? Is that true?

“A. Well, most—quite a lot of the equipment was our own that we used on the job.

(Deposition of Ben. F. Wells.)

“Q. Yes.

“A. We hired some. Whatever we needed to fill up.

“Q. Yes. By ‘we’ you mean you did?

“A. Yes.

“Q. That is part of your job, isn’t it?

“A. Well, sure, it is part of my job, but it is the company.

“Q. Yes. There is no quarrel about that. As general superintendent, why, that is one of the duties you are supposed to discharge—isn’t that true, Mr. Wells?

“Mr. Schell: Just a moment. That is objected to as assuming something not in evidence—that he was general superintendent. He said he was construction superintendent.

“Mr. Barnett: I will admit that. I think you are right.

“Q. As construction superintendent of this particular job, that was part of your duty to hire such equipment as would do the work—isn’t that true?      A. That is right.

“Q. All right. Now, you know Farr and Sinclair, don’t you?      A. Yes, I met them.

“Q. Where did you meet them?

“A. Well, the first time I met them they come up to my apartment at 926 Powell Street.

“Q. And subsequent to that time you did enter into a contract with them for the use of four trucks?

(Deposition of Ben. F. Wells.)

“A. Well, I didn’t enter into any contract to hire any—I hired some trucks off of them, yes.

“Q. Yes. Now, getting back to the work which we described here [146] a moment ago, that was 600,000 yards of dirt to be removed?

“A. Yes.

“Q. And at the time that you first entered into the contract to remove that, did you form any estimate as to how long it would take to remove it?

“A. Well, I think maybe I might have said what—how many days it would take to move it.

“Q. And what did your estimate say at that time?       A. Around 60 days.

“Q. And what length of time did it take you?

“A. Actual working time, I think it was 54 days.

“Q. And by days, how many hours do you mean?

“A. 21 hours a day we were working.

“Q. 21 hours per day. And it took you approximately 54 days of 21 hours to do that work? Is that correct?

“A. That’s right.

“Q. Do you recall having a conversation with Farr and Sinclair during which the length of time it would take you to remove—to do this job was discussed?

(Deposition of Ben. F. Wells.)

“A. Well, I don’t know as I could recall it. I think that I did tell them it would take us 60 days. We were going to move 10,000—10,000 or 15,000 yards a day, and 600,000 yards would take us around 60 days to remove it.

“Q. Did you have any further conversation relative to the time that it would take you to move the dirt, other than what you have told us?

“A. None that I know of. I don’t recall.

“Q. Was there any conversation between you and these gentlemen relative to their purchasing four trucks to be used in this work?

“A. Well, they told me, after one or two visits to my place, that they were going to buy these trucks.

“Q. For this particular job?      A. Yes.

“Q. And was anything said about payments on the trucks?      A. Yes. [147]

“Q. Will you state the conversation, please?

“A. Well, I couldn’t recall exactly. They told me one time how much they was going to pay for these trucks—how much payment—and I told them that that was foolish, that they couldn’t make that much money out of these trucks; no trucks would make that much money—having 20 years experience in trucking myself; and I think that one particular night

(Deposition of Ben. F. Wells.)

they brought an agreement up for me to sign. As well as I recall, it was something that guaranteed to Young & Son so much payment, and I told them I couldn't sign it and I wouldn't sign it; that I didn't have any authority; that I was only construction man; that I was no officer of the company; that I knew our officers of the company wouldn't sign it anyhow. And then later on an agreement came through assigning their earnings to Young & Son.

“Q. Do you recall what that agreement stated?

“Mr. Schell: Which one are you talking about, Mr. Barnett?

“Mr. Barnett: Well, the one he just mentioned.

“A. To Young & Son?

“Q. That is right.

“A. Well, I have a copy.

“Q. That was an assignment of the——

“A. Yes, an assignment.

“Q. A consignment, as you call it, of what they might have coming, to Young & Son?

“A. Yes, sir.

“Q. And am I correct in saying that that covered payments over a period of four months?

“Mr. Schell: Just a moment. We object to that. The assignment would be the best evidence.



(Deposition of Ben. F. Wells.)

“Mr. Barnett: That is true, but if he has any recollection of it, that is what we are getting at.

“A. I have no recollection.

“Q. You have no recollection at all as to that? [148]

“A. As to the terms of that, yes.

“Q. But it is your impression now that at the time that you hired these trucks from these boys in the manner that you have indicated, you told them that they would have approximately 60 days work? Is that true?

“A. Well, I never——

“Mr. Schell: Just a moment——

“A. I never promised anything.

“Mr. Barnett: Q. Well, you told them that the job would take about 60 days—is that correct—60 days of 21 hours? A. Yes.

“Q. Now, is it true that you were paying them \$2.70 per hour per truck? Is that part of the agreement?

“A. Well, I couldn't say. I would have to look that up.

“Q. And in addition to that, the sum of \$1.43—approximately \$1.43 per hour per man for salary—is that true?

“A. You mean for drivers?

“Q. Yes.

“A. We were carrying the drivers on our payroll.

(Deposition of Ben. F. Wells.)

“Q. In other words, these men—and I refer to the plaintiffs here—were to get \$2.70 per hour per truck, and you were carrying the drivers on your payroll? Is that correct?

“A. I have to look that up. We have got a record of that.

“Mr. Barnett: Have you the record with you, Mr. Schell?

“Mr. Schell: No, I don't have the record. My own recollection is that the \$2.70 included the driver, and salary was deducted, but I am not positive.

“Mr. Barnett: No, I think that was in addition.

“Q. Have you any memory at all on the subject, Mr. Wells?

“A. Well, I think that was something that we—we paid the drivers. I don't know whether that was deducted or not, but I [149] have a record. I haven't brought it along. And then the gas and oil, we furnished that and deducted that from their earnings.

“Q. Now, how long did these men furnish these trucks for that work?

“A. Well, I think I looked on the record—they worked around 17 days; they were there 17 days—part days and some full days.

“Q. And by that you mean the two men, Farr and Sinclair, plus the drivers?

“A. Well, I wouldn't say that they were

(Deposition of Ben. F. Wells.)

there, but the trucks were there. It shows on our record from the time they started working till they quit working was, actual days, 17 days. I think they were around in the neighborhood of two months.

“Q. Have they received any money for that work?      A. None that I know of.

“Q. Have you a record of how much is due on it, if anything?      A. Yes.

“Q. Do you know what that is?

“A. Oh, that record shows—well, I couldn't go into details on that. That is in the office.

“Q. It is your recollection now that they worked for how many days? 17 days?

“A. Something like 17 days.

“Q. How long did it take to finish the job?

“A. Well, we worked 54 days on the job.

“Q. Now, at the time that you started, do you recall how many trucks you had in operation on the job?

“A. Oh, I think maybe the first day we had 10 or 12 or 14—something like that—but as we would go along we had up as high as 28 or 29 trucks.

“Q. Now, of the total amount that you had on the job, how many belonged to you?

“A. At what time on the job?

“Q. The start of the job?

“A. I don't think we had any of [150] our own at the start of the job.

(Deposition of Ben. F. Wells.)

“Q. During the course of the job did you have any of your own trucks? A. Yes.

“Q. Was there any particular reason why you didn't have any of your trucks on the job at the start of the job?

“A. They were busy on another job.

“Q. And when were they released from this other job? A. I couldn't say.

“Q. Would you say it was at or about the time that Farr and Sinclair were withdrawn from the job?

“A. It was somewhere in the neighborhood.

“Q. About that time?

“A. Offhand, yes.

“Q. And so whatever work they were doing was then done by trucks that were released from some other job—is that correct?

“A. Well, I couldn't say definitely.

“Q. Mr. Wells, let me ask you this: Was that the reason why you released them from further work on the job. A. No.

“Q. What was the reason?

“A. Because their trucks wouldn't stand up and they couldn't keep them running; maybe have one out of four running.

“Q. Did you pay them for one out of four?

“A. We paid them on the actual time they worked.

“Q. And if a truck was not running, why, of course, it wouldn't be paid for?

(Deposition of Ben. F. Wells.)

“A. No, sir.

“Q. So the fact that some of your trucks—by ‘your’ I mean Macco Construction Company—were available for work after the job commenced had nothing to do with releasing the four trucks they had in operation?

“A. No.

“Q. Is that true?           A. That is right.

“Q. And your reason for releasing them was what?

“A. Their [151] trucks weren’t mechanically in condition to keep running.

“Q. Was that the sole reason?

“A. I will say that was the main reason.

“Q. Was there any other reason?

“A. Well, there was on the minor details of different things—that we couldn’t keep drivers on them.

“Q. Anything else?

“A. We couldn’t keep an organization. We would go out with so many trucks in the morning, and in an hour or so they would be broke down and our shovels would be standing waiting.

“Q. When did that occur? How many days after they started to work?

“A. Well, I wouldn’t definitely say. The boys—the trucks weren’t in shape to work.

“Q. Was that the case from the first day on?

(Deposition of Ben. F. Wells.)

“A. Practically from the first day on.

“Q. In other words, from the first day they started to work, for 17 days they were in condition to run?

“A. Well, I would say maybe the first day. They had trouble, of course, naturally; you would expect some trouble, but not so much as they had. I think they expected it themselves.

“Q. Is there any other reason that you can give why they were let out?

“A. Well, that was the main reason why.

“Q. That you couldn't keep drivers on, and you couldn't maintain an organization—is that true?

“A. That is right, and because of trucks breaking down.

“Q. Those were the two main reasons, and the fact that you had your own trucks available had nothing to do with it?

“A. Not a great deal, no. We told them ahead of time, a week or so, that we was going to have to let them go.

“Q. And did you give any reason at that time? [152]

“A. Well, they knew the reason. We didn't have to tell them.

“Q. Well, it is not what you might have thought they knew, but did you tell them anything, Mr. Wells?

(Deposition of Ben. F. Wells.)

“A. No, I didn’t tell them.

“Q. And what type of trucks were they?

“A. Well, they were Autocar dump trucks.

“Q. About how many tons?

“A. Oh, I suppose about a 10 or 12 ton truck. They would handle 10 ton, I would say.

“Q. What kind of trucks did you replace them with?

“A. Well, we have various—different types of trucks, bigger trucks and better trucks.

“Q. By ‘we’ you mean your own trucks?

“A. Our own company, yes.

“Q. And about how many tons were they?

“A. Oh, about 16 tons.

“Q. And where did those trucks come from? From what job?

“A. From San Diego.

“Q. Did you drive them up here?

“A. Yes, sir.

“Q. As I understand it, they were not available when this job first started?

“A. No, they were working on other jobs.

“Q. Now, at the time that you hired these trucks, Mr. Wells, your conversation was that the job would take about 60 days?

“A. Well, now, I don’t think there was any conversation much about it. They just wanted to know how long it would take, and I said around 60 days.

“Q. And, as a matter of fact, it took approximately 54 or 55 days—is that true?

(Deposition of Ben. F. Wells.)

“A. 54 days, yes, sir.

“Q. Do you recall that there was anything in the agreement or contract between Bethlehem and your company as to the length of time the contract was to go?

“A. I couldn't say.

“Q. Have you any recollection on that subject?       A. No. [153]

“Q. You have knowledge, however, that these boys bought the four trucks for this job, though, haven't you?

“Mr. Schell: Just a moment——

“Mr. Barnett: I will withdraw it.

“Q. Have you any knowledge that they bought the four trucks for this job?

“Mr. Schell: At the present time he is dealing with now.

“A. Yes—not when I hired them. They told me that they were going to buy them. When they first contacted me, I had no knowledge of them buying trucks. I thought they owned them themselves.

“Mr. Barnett: Q. And subsequently and during the time of the job you acquired that knowledge—is that correct?       A. Yes.

“Q. It was about January 18th when they stopped work—isn't that true?

“A. Well, I couldn't say.

“Q. Do you know when you completed the job—what date?       A. No.



(Deposition of Ben. F. Wells.)

“Q. At any time did you have any knowledge that these trucks were purchased from Young & Son in Berkeley?

“A. Yes, they told me; the boys told me.

“Q. And when was that?

“A. Well, that was just before they brought them on the job.

“Q. Did you know that—I will withdraw that. Just before the first day that they started to work?

“A. Well, when they brought that guaranty to me, that is when I realized where the trucks had come from.

“Q. And that was on or about the 3rd of December—isn't that true?

“A. Well, I couldn't say.

“Q. You don't recall having any conversation with anybody regarding the duration of this contract with Farr and Sinclair?

“Mr. Schell: Other than what he has stated.  
[154]

“Mr. Barnett: Q. Yes, other than what you have said?

“A. Yes, other than what I have stated.

“Q. Do you recall having a conversation with a representative of Young & Son? Do you recall telling them or him that in your opinion this job would take about four months?

“A. No.

“Mr. Schell: Just a minute. That is ob-

(Deposition of Ben. F. Wells.)

jected to as very vague and calling for the conclusion of the man who was representative of Yonug & Son. Your question is vague, but he doesn't remember whether he ever had a conversation——

“Mr. Barnett: Well, he has answered no. This is cross examination, and the record will show, under our previous stipulation, that this is taken pursuant to 2055, and that it was intended as that.

“Q. You don't recall having such a conversation?      A. With who?

“Q. With the representative of Young & Son?      A. At what time?

“Q. Did you on or about December 3rd, 1940?      A. No, sir.

“Q. Did you have any conversation at any time with a representative of Young & Son?

“A. Someone—I think it was their attorney—called us one time in regard to how much money they had coming, and that was after the trucks weren't working.

“Q. After the trucks quit working?

“A. The trucks weren't working for us any more.

“Q. So that, as you recall, neither prior to the time that they started to work nor at or about the time they started—to-wit, on December 3rd—did you have any conversation with anybody regarding the duration of the work that Farr and Sinclair had with you?

(Deposition of Ben. F. Wells.)

“A. No, sir.

“Q. You never had any conversation other than what you have told us?

“A. None that I know of.

“Q. Then is it true that your agreement with them was that they [155] were to work for you as long as you wanted them to work?

“A. That is true. We hired them as we have always hired trucks like that.

“Q. And by ‘we’——

“A. The company, yes.

“Q. In other words, there wasn’t any definite period of time to that agreement?

“A. No, sir.

“Q. The reason you let them go was that they didn’t have—they couldn’t keep drivers and they were undependable as far as the equipment was concerned? Is that true?

“A. That was the main reason for letting them go.

“Q. You say that your title is that of construction superintendent—not general superintendent?           A. No.

“Q. Who is the general superintendent?

“A. Well, Mr. Davis would be rated the general superintendent out of the Los Angeles division. He had charge of everything. He is also vice-president.

“Q. Who is the general superintendent of this division?

(Deposition of Ben. F. Wells.)

“A. Well, I am superintendent out here, in charge of the jobs.

“Q. Yes. In other words, you are the head man of this division—isn't that true, Mr. Wells?

“A. Yes, to a certain extent. Mr. Davis is over me.

“Q. Yes.

“A. And Mr. McLeod (McCloud) also.

“Q. Yes, but usually you would let the contracts, would you not?

“A. Well, if it is anything that amounts to something I always take it up with my superiors before I do anything.

“Q. Now, were you consulted prior to the time that your company bid on this job?

“A. Was I consulted?

“Q. Yes.

“A. I was here in town when we took this job, and looked at it, but when the job was bid I wasn't here.

“Q. Did you see any figures?

“A. Well, not, because we [156] only talked about it and discussed it, and I went back over—I was on the other side of the mountains building a dam, and I left town.

“Q. Was there any time placed on your bid as to when the job could be completed?

“A. I couldn't say. I have never seen the contract.

(Deposition of Ben F. Wells.)

“Q. Have you any recollection as to whether or not there was a time element in it?

“Mr. Schell: He just answered he has never seen the contract.

“Mr. Barnett: That is all right. He might have knowledge without seeing the contract.

“A. I wouldn't know.

“Q. So that the first day you had approximately 17 trucks in operation?

“A. I wouldn't say—we had two shovels, and there was 12 or 14 or 17 trucks, maybe, on the job. I couldn't say. I would have to look up the record for that.

“Q. Well, where are those records?

“A. We have them in our office here in San Francisco.

“Q. And where is your office located?

“A. 776 Folsom.

“Q. And after the first week how many trucks did you have in operation?

“A. Well, that's hard to say. Our haul increased; we had a longer haul. We added more trucks, and we added another shovel.

“Q. Well, can you tell us the minimum and maximum amount of trucks and shovels you had during the job?

“A. Well, there was three shovels, and I think at one time we had—oh, I couldn't say—either 29 or 30 or some trucks—something like that—at work any time from, maybe—I don't know—the first day maybe it was a

(Deposition of Ben F. Wells.)

small number of trucks, [157] but I think we had up as high as around 29 or 30 trucks at one time. I couldn't say.

“Q. Was there any bonus given to you, or was there any penalty imposed, for finishing the job either earlier or later—a penalty if you finished it later than the designated time.

“A. Well, I couldn't say that. I have never seen the contract.

“Q. Of course, it was your idea to put on good equipment and to finish the job as soon as possible?

“A. The Navy was in a hurry. That is all I know.

“Mr. Barnett: That is all.

“Examination

By Mr. Schell:

“Mr. Schell: Q. At the end of the job, Mr. Wells, you just had a few trucks working?

“A. Yes.

“Q. The last two weeks?

“A. I think we had seven—I think seven or eight trucks the last three weeks, I guess.

“Q. That was just clean-up?

“A. Clean-up.

“Mr. Schell: That is all.

“Examination

By Mr. Barnett:

“Mr. Barnett: Q. Well, that is usual, isn't it?

(Deposition of Ben F. Wells.)

“A. Yes. We shipped out some shovels; in fact, we moved all three big shovels off before we were done, and used a smaller shovel to finish up.

“Q. Yes. Well, that is general clean-up work. How long did that take you?

“A. Well, the first shovel went out almost a month before we were done; and another one went out the following week, and we were working down to one shovel at the final—at the end.

“Q. Yes. And the most trucks you had was 29, you say?

“A. I wouldn't say positively, but it was up in that neighborhood.

“Mr. Barnett: Approximately. All right, that is all.” [158]

Then it is signed, subscribed and sworn to.

With that the defendant rests, your Honor. We wanted to have the jury examine that exhibit.

The Court: Which exhibit?

Mr. Schell: The tabulation of the various costs and expenses that went in in lieu of some of the testimony of Mr. Tucker.

The Court: Yes, it can be shown to the jury sometime; I assume it will be all right during argument?

Mr. Schell: Yes, that is all right.

Mr. Barnett: Your Honor, I wanted it distinctly

understood that my stipulation did not cover that as an exhibit except for a limited purpose, that the witness would testify to what appeared on that sheet.

The Court: I think the jury understands what this sheet was introduced for. Any rebuttal?

Mr. Barnett: Your Honor, I think I have one or two questions to ask, but I don't know what your Honor's custom is as to recesses, and we have been here since 2 o'clock, and frankly, I could stand a recess.

The Court: I would like to clean up the case and let the jury go.

Mr. Barnett: The rebuttal will be very short. I would like to have it at the next session.

The Court: No, I would rather not.

Mr. Barnett: It will be Mr. Sinclair, your Honor, and this will be quite an ordeal, and I would rather have it at the next session.

The Court: I would rather not.

Mr. Barnett: Judge, you certainly work lawyers. [159]

The Court: Well, I don't spare myself.

Mr. Barnett: There is a lot more to you, though.

The Court: Would any of the jurors like a recess before we start in on this? How long do you think it will take?

Mr. Barnett: Just two or three questions, but your Honor will observe what I have to contend with.

The Court: No.



ROBERT SINCLAIR,

Called for the Plaintiffs; previously sworn.

Mr. Barnett: Q. Mr. Sinclair, Mr. Tucker mentioned something about a conversation you had with him in which the name of Eaton & Smith was mentioned, and he stated that he had two such conversations. Do you recall such conversations?

A. (Writing): I recall at the time he fired us he asked why we didn't try and get the trucks on with Eaton & Smith.

(Answer read by Mr. Barnett.)

Q. Did you ever have such a conversation with Mr. Tucker prior to the time that he fired you?

A. No, sir.

Q. Did you ever have a conversation with anybody prior to the time that he fired you regarding Eaton & Smith?

A. No, sir.

Q. And I refer to the defendants?

A. No, sir.

Q. At the time that this contract was originally entered into, did you have any conversation relative to where the work was to be done, and I refer to the Bethlehem Steel Company property?

A. Yes.

Q. With whom, and what was said?

A. (Writing): Mr. Wells said the whole job was to be on private property at the Bethlehem Company. He said they were going to put the dirt on barges and take it to Alameda. [160]

(Answer read by Mr. Barnett.)

(Testimony of Robert Sinclair.)

Q. Did you ever have any conversation with Mr. Tucker, or did you ever stop him on the job and have a conversation with him in which you asked him how much longer you were to last?

A. No, sir.

Q. Did you ever have a conversation with Mr. Burch, the foreman, in which the subject of how much longer you were to last on the job took place?

A. No, sir.

Mr. Barnett: Well, I will withdraw that.

Q. Do you remember having a conversation with Mr. Burch relative to the duration of the job?

A. No, sir.

Q. Did you have any conversation with Mr. Burch touching upon this equipment, the condition of your equipment—withdraw that. Did you ever have any conversation with Mr. Burch regarding the condition of your equipment?

A. Probably.

Q. Do you recall when and where?

A. (Writing): We saw him all the time. I remember he said to get cab shields on the trucks.

Q. Did he at any time refuse to send out—withdraw that. Did he at any time state to you that he refused to send you out on a shift because your equipment was not fit? A. No, sir.

Mr. Barnett: That is all, your Honor.

#### Cross Examination

Mr. Schell: Q. Mr. Sinclair, have you discussed your testimony with anybody since 3 o'clock this afternoon? A. (Writing): Mr. Barnett.

(Testimony of Robert Sinclair.)

Q. You had your deposition taken some time ago, did you not, Mr. Sinclair?      A. Yes, sir.

Q. You were asked in that deposition for all of the conversa- [161] tions you had with Mr. Wells on the subject of this hauling?

A. (Writing): I do not know.

(Answer read by Mr. Schell.)

Q. It is your recollection that you have never testified until now anything about any conversation with Mr. Wells to the effect that all of the hauling would be on private property?

Mr. Barnett: Your Honor, I will submit that is argumentative.

The Court: He may answer.

Mr. Barnett: If he recalls.

A. (Writing): I don't recall.

(Answer read by Mr. Schell.)

Mr. Schell: Q. You don't recall ever having testified to that effect before, do you?

A. No, I don't.

Q. When you say you discussed your testimony with Mr. Barnett after 3 o'clock, was that the subject matter of discussion, this hauling on private property?      A. No, sir.

Q. It was part of that discussion?

A. No, sir.

Mr. Schell: That is all.

Mr. Barnett: That is all, your Honor. I think that is all, your Honor.

The Court: Ladies and gentlemen of the jury, I don't want to work you too hard, but we have an opportunity to finish this case up tomorrow. After the arguments, which I understand will not be of great length, and the instructions, then I shall give the case to you for your consideration. Or if it is much more convenient to everyone, I will put it over until Monday, but I assume you would rather finish the case entirely tomorrow.

A Juror: I have a case coming up on Monday, in which I have to be a witness. Saturday will be all right with me. [162]

The Court: Apparently the majority of the jury feel that Saturday would be better. Would you like to start earlier or later? Normally, we would start at 10 o'clock. If there is no expression of opinion on that, I will start at 10 o'clock, but if you would rather start earlier I will start an hour earlier.

You have now heard all the evidence in the case, so it is particularly important that you shall not discuss it amongst yourselves or remain in the presence of other persons who might discuss the case with you until it is finally submitted to you tomorrow morning by the Court for your deliberations. You may now retire, and return here tomorrow morning at 10 o'clock.

(Thereupon an adjournment was taken until 10 o'clock A. M., Saturday, March 7th, 1942.)

[163]

Saturday, March 7th, 1942

10 o'clock A. M.

The Court; Proceed.

Mr. Barnett: Plaintiff is ready, your Honor.

Mr. Schell: Defendant ready, your Honor. At this time, if the Court please, on behalf of the defendant Ben F. Wells, I move this Court for a directed verdict in favor of said defendant on the ground that under any interpretation of the evidence, or for that matter, the pleadings, Mr. Wells was merely acting as an agent for a disclosed principal, and so whatever he did, there would be no personal liability on Mr. Wells for any amount of money due the plaintiffs, if there is anything due.

(Argument by Mr. Schell on motion.)

The Court: I deny the motion.

Mr. Schell: At this time on behalf of the defendant Macco Construction Company and the defendant Ben F. Wells, and each of them, we move the Court for a directed verdict in favor of the defendants, and each of them; first, on the ground that the evidence fails to establish a valid contract or any contract entered into by and between the plaintiff and the defendants, or either of them, for any particular time:

That the evidence affirmatively shows that the plaintiff had no capacity to contract or engage in the business of transportation of property for hire. That is in connection with the carrier act;

That the evidence fails to show that the defen-

dants, or either of them, wrongfully breached any contract, and plaintiffs have failed to show that they sustained any damages.

In connection with this motion, I will urge the further [164] ground that it affirmatively appears from the evidence that in the event there was no contract for any definite period of time that contract was a novation.

We urge the further ground that in the event the original contract contemplated hauling over private property that without the showing of any duress or fraud or oppression or anything else, the parties varied no terms of that agreement, and that constituted a novation; and in view of the undisputed evidence that plaintiffs were not in the position to carry out the terms of the contract we believe that their cause of action has failed.

(Argument on motion.)

The Court: Motion denied; exception allowed.

Mr. Barnett: Shall I commence the argument, your Honor?

The Court: Yes.

(Arguments to the jury by respective counsel.)

The Court: Now, ladies and gentlemen of the jury, it is lunch time. Do you want to go to lunch before I instruct you?

A Juror: Stay with it.

The Court: I will give you a short recess. Court is in recess.

(Recess.)

The Court: Now, ladies and gentlemen of the jury, you have heard all of the evidence in the case of Farr and Sinclair, as plaintiffs, against the Macco Construction Company and Ben F. Wells, the defendants.

It is now my privilege and my duty to tell you what the rules of law are that you are to apply in determining what are the facts in this case. You will have with you in your jury room the pleadings in the case; that is, the written documents upon which the respective claims of the parties are based. I [165] will try to outline for you what are the questions between counsel and suggest to you the rules of law which you are to apply. Now, there are a good many things that come into a trial of a case that are not evidence. Counsel have a right to make arguments before you, and one represents one side and the other the other side. Naturally, since they are hired to try the case they take a partisan viewpoint from a standpoint of their own clients. They are here to win the case. That is what they are here for. While counsel have a right to argue that viewpoint, that is not evidence. You have to get your facts from the documents in the case, and from what the witnesses testified to. Likewise, you have the written documents on what they call the pleadings, the complaint and answer in this case; but those are not evidence either, although it is true that any fact which any party admits does not require proof. You can, of course, accept any argument counsel makes to you which you think is sound

and reasonable, but the viewpoint depends on yourself and not on what counsel says.

Likewise, the Judge in the Federal Court has the right to comment on the evidence and tell you what he believes the determination of the case, or discuss the credibility of any witness. But this is a simple case, and therefore, I shall not exercise my power or responsibility to tell you what I think about this case. I will further state to you that if any of you know by any expression of mine how I think the case should be determined, that you are not bound by that at all. You are the sole judges of the facts of the case, and you have the responsibility to determine them correctly under the rules of law. Your responsibility is a heavy one; much heavier than mine, because there is no way of appealing from the determina- [166] tion on a question of fact. That is final and binding on everybody.

This is a civil case, and is based upon a complaint, which is a claim made by the plaintiffs, Farr and Sinclair, that they have been damaged in some respect by the Macco Construction Company and Mr. Wells. I have not taken Mr. Wells out of the case so far, but I say to you now, that as far as I can judge from the evidence, there is no claim that Mr. Wells is directly responsible personally for this contract. The plaintiff doesn't claim that he entered into a contract on his own account, and the defendant doesn't believe that either. The contention is that Mr. Wells was the agent of the Macco Construction Company, and entered into a contract for them. He could only



enter into a contract for them so far as he was their agent and in so far as his authority carried him. The question of authority is before you by sizing up the contention of both parties. I don't think that there is any basis in this case under which you could give a judgment against Mr. Wells. I think that any judgment that you would give, you would give against the Macco Construction Company. While I don't mean directly, as a matter of law, to say that you cannot give a verdict against Mr. Wells, I say that as the facts in the case shape up that it is my opinion that he is not liable. So, therefore, I would suggest that you return a verdict against the Macco Construction Company, if against anyone.

That is the next question I will now take up. I say, even in that regard, you are not bound by what I say or bound to follow that comment if you thought he would be liable under the facts and the law as I now give it to you.

The next thing in the case is this: That is, the ques- [167] tion of the amount that is earned, that these people actually earned on the job is in controversy. Defendant Macco Construction Company says that they have earned a certain amount, and the plaintiffs, as stated, say if there is no express contract, that that is true, but that amount represents the amount that they actually earned for the labor they did, if there was no express contract as claimed by the plaintiffs.

So, then, we now approach the matter of conflict

between these two parties. The plaintiff says it is claimed that on or about the 3rd day of December, 1940, defendants and plaintiffs entered into an oral agreement in the City and County of San Francisco, State of California, wherein and whereby plaintiffs agreed to furnish four auto trucks and the personal services of the plaintiffs; that is, Farr and Sinclair, in the operation of the same; and the defendants agreed to hire the exclusive personal services of said plaintiffs and the equipment for the entire duration of that certain grading and excavation project of the defendants situated in the City and County of San Francisco; and that the period contracted for, as aforesaid, was and is approximately four months.

Now, the defendant Macco Construction Company—because I am *discuss* them—on the other hand said that that agreement was not for the hiring of trucks or any truck, or any personal services for the entire duration of the grading and excavation project of the defendant; but on the contrary, Macco Construction Company says that the agreement was that the plaintiffs Farr and Sinclair would furnish and maintain the four auto trucks in good, safe, serviceable, workable condition, and the personal services to be rendered in the operation therefor for such time as the Macco Construction should desire to avail themselves thereof in [168] connection with the grading and excavation project of the defendant, and for no other purpose or longer period of time.

So there you see what the issue is. Everybody admits there is a contract. The question is, what was the contract? The contract was for the hiring of these trucks and the personal services of Farr and Sinclair in the operation thereof, without question, but the parties disagree as to whether that was to last for any particular time. Plaintiff claims the contract was for four months, the duration of the Bethlehem job; and the defendant, on the other hand, says, "No, we didn't have that term of contract; it was simply to do that, and when we were ready to get rid of Farr and Sinclair, why, we could."

Now, there are other terms of the contract which are admitted. The defendant admits that it agreed to pay Farr and Sinclair as and for compensation for their services and for the use of such equipment \$2.70 per hour per truck while the truck was in condition to be operated and was being operated for the benefit of Macco Construction Company; and in addition thereto, the sum of \$1.42851 cents per hour on account of the payment of the salary of the drivers of each of said trucks for the time during which the driver was on duty in connection with the business of the defendant. Now, in that connection there are some other things which I think are not particularly important, "On account of personal liability and property damage insurance, workmen's compensation insurance, Federal old age social security, gasoline and oil furnished by this defendant, the time of mechanics, and the cost of parts necessary for re-

pairs to said trucks incurred by this defendant on behalf of plaintiffs, time during which the drivers of said trucks were not actually engaged in the business of performing services of this defendant due [169] to the condition of said trucks and other items of cost and expense reasonably incurred by this defendant on behalf of plaintiffs in connection with the operation of said truck equipment."

That simply means that the defendant was not going to pay the plaintiff until it deducted the things it had to pay on plaintiff's account. So I don't think that is particularly in controversy between the parties.

But the facts of the controversy are these; as to whether or not this particular term as to "duration" is included in this contract in the first instance; and the controversy about the reasonable condition of the trucks to perform the job. It would be implied that the equipment furnished would be reasonably capable of performing the work, because obviously no one would expect a person to contract for equipment that couldn't perform the work; that is one of plaintiff's responsibilities.

Now, there has been a controversy arisen over this, and the plaintiff has come into court asking for damages because of the fact that this controversy has not been settled to their satisfaction. Under those circumstances, the plaintiffs have the burden of proving all of the matters which plaintiffs set up. In other words, plaintiffs have the burden of proving, in the

first instance, that there was a contract as they allege containing this term as to duration, and they must prove that by a preponderance of evidence.

Preponderance of evidence sounds like a mysterious term, but it is not. Preponderance of evidence simply means the greater weight. That does not mean the greater number of witnesses; it simply means the plaintiffs must prove their contention regarding this contract by evidence which is more convincing [170] to you taking it as a whole, than that which has been produced by the defendants.

In the event you find this term of contract was included, and there was an express agreement to that effect, then you will consider the other question in this case. If you find that the plaintiffs have failed to prove that this term was included in the contract, you will then go no further in the case, but determine for the defendants.

Now, in determining whether the contract was one that the plaintiffs contend it was, or what the defendants contend it was, you should carefully consider all the evidence that you have heard surrounding the entering into the contract, and particularly the language used, because in the formation of a contract there must be always a meeting of the minds of the parties as expressed between them. So, therefore, the language used by the parties at the time it is claimed that an oral contract was entered into must always be of great importance in determining whether the contract was of one type or another. Therefore, you will very carefully consider what

was said between these respective parties at the time it is claimed this contract was entered into.

There are also other matters which you may consider. You may consider this question about the things that the plaintiffs did after or about the time that they were getting ready to enter into this contract. One of the things is the purchase on the conditional sale contract of these trucks. You may consider that fact or give it the weight you believe it to have in determining what plaintiffs were attempting to express in the contract. They must have expressed it; otherwise the contract would be as I say. You may consider this conditional sale contract in [171] determining what the parties meant by what they said.

You may also consider this document that has been called a "guaranty" given by Mr. Wells for the Macco Construction Company regarding payments that he would make to Young & Son on the conditional sale contract during the time that Farr and Sinclair were working. Now, it is necessary for me to construe that document for you. I say to you that that guaranty is a promise upon the part of Macco Construction Company to pay to Young & Son, Incorporated, that amount of money that Farr and Sinclair earned, and nothing else. They were not obligated to pay any more. It is true that there is a specification of so much per month for these four months; but they are not obligated to pay a cent more than Farr and Sinclair earned on this contract. I am not saying that because I am interpreting a

written document that I am saying what implication you should draw from that as to the existence of this oral contract with which you are particularly concerned. But that is the interpretation of the contract that was signed by Farr and Sinclair and Young & Son, and accepted by Mr. Wells for the Macco Construction Company.

Likewise, there has been some comment upon the fact that the evidence does show that at the time that they were told that they were through, that is, Farr and Sinclair were told that they were through, that they made no comment, and apparently took what the record showed at that time. You may consider that in determining whether there was a contract, in the first instance, or not; but even if they had a contract, they could do just exactly the same thing and still may be liable if there was a contract for the duration. They don't have to say, "Well, we are going to sue you," or, "We have a contract, and we are going to stand on it." If they had a contract, they would [172] have to stand on it, as far as that goes. The admitted part of it is that at the time when they were put off the job, they did look at the record and indicated that so far as the record was concerned that it was correct in so far as what they earned. Therefore, you may take into consideration the determination of whether there was a contract or not, but it is not conclusive one way or the other. Now, the defendant Macco Construction Company also has an-

other viewpoint. They say that there was a term, either express or implied, that these trucks when they first came on the job would be reasonably in condition to do the work expected of them. They say that because the evidence shows that the first day the trucks didn't work a great length of time and that there was afterwards work done upon them to fit them out better—and you have heard both sides on what that work was—that the defendant told these men through one of its agents that they were through. In other words, that if there was an expressed contract at that time, that the defendant takes the viewpoint that it then said, “We declare this contract off;” and that the plaintiffs agreed to it by saying, “Well, could we do something to get back on the job?” If the parties at that time agreed upon the oral contract by mutual consent, they could do that without liability on either side, and thereafter they could enter into a new contract. This is what defendant claims. However, that is a question of fact which you must determine as to whether the defendant did abrogate the contract with the consent of the plaintiffs at the time the plaintiffs first came on the job on the 9th day of December, and thereafter made a new arrangement with them whereby they were hired day by day.

If you find that the plaintiffs' contention was established [173] that there was a contract of four months duration, and that was not abrogated, according to defendants' contention, but existed from



that time on up until the 17th day of January, I think it was—at any event, the date when the plaintiffs were told finally that they were through—then you have to determine who breached the contract. If the defendant, when such contract was in effect, arbitrarily, without legal excuse—and I will define that in a moment—told the plaintiffs to leave, then that was a breach of contract, if you find that there was a contract for that duration of time. Then, if the defendants put them off the job and told them they couldn't work any more, then that constitutes a breach of contract and there is not any legal excuse for the breach of contract. Defendants claim that plaintiffs failed to carry out the contract, and defendants claim that that breach was accomplished in this way, that the plaintiffs' equipment was not reasonably fit to carry on the work that they knew they were required to turn over and accomplish. Now, the defendants would be required to establish those conditions affirmatively, and that is by a preponderance of evidence to show they had a legal excuse for letting them go. If you find, in the first place, there was a contract which plaintiffs claimed did exist, and that the terms of the contract implied fitness of equipment to do the job, and on that day and before that time the plaintiffs had broken the contract by not having the equipment in reasonable shape to carry on, then you may determine that the defendants properly exercised **their right** to declare that the plaintiffs were in default of

the contract. If the defendant did that under those circumstances they would not be liable for anything. On the other hand, if the equipment was reasonably sufficient for the work on the job, and you so [174] find, and find that the defendants without any proper excuse of that sort broke the contract itself by putting these people off the job, then you may consider the question of damages.

Now, in determining the question of damages, I will give you instructions on them. At this point, however, I am not indicating that you shall find them. It is for you to determine, first, whether or not the defendants are liable. But, at any rate, if you come to the question of damages, then plaintiffs would be entitled to recover whatever would reasonably compensate them for the wrongful breach. In determining what sum that would be, why, you would have the right to take into consideration all of the expenses that they had been put to, if you find that there were any acquired under the contract in putting these trucks in shape and the expenses, if any, in acquiring the trucks, the expenses in preparing them by getting licenses, or whatever is in the evidence. I do not say that is one of the features, because I don't know whether that is in the evidence, but anything which was necessary to prepare the trucks for the job. Likewise, the loss, if any, the actual loss of any time that the plaintiffs may have suffered. You have the right also to give them any profits that you find they would have *arned*. Now,

you cannot speculate on that. Ladies and gentlemen, it is not a basis for speculation, but you must have evidence that they would have *arned* under the terms of the contract a certain profit and assess that profit in considering and arriving at damages. I shall not go into the features of whether there was a profit or not. You heard the evidence on that. You heard both sides, who presented two schedules; one, claiming there was a substantial profit that would be earned, and the other, showing that the operation would be carried [175] on at a loss. But that is a pure question of fact, which is submitted for your determination.

You are the sole judges of the fact in the case and of credibility of all of the witnesses. Your power of judging the effect or value of evidence is not arbitrary, but must be exercised with legal discretion and in subordination to the rules of evidence. You are not bound to find a verdict in conformity with the declaration of any number of witnesses whose testimony does not produce conviction in your minds, or against the testimony of one witness *who* testimony does impress you as being true, and does produce conviction in your minds. The testimony of any one witness to a fact in this case is sufficient if it produces conviction in your minds to establish that fact.

Every witness is presumed to speak the truth. This presumption, however, may be overcome by the manner in which he testifies, the character of

his testimony, or by evidence affecting his character or motives, or by contradictory evidence. If you find that a witness has testified falsely in part of his testimony, you may look with distrust upon the other evidence given by the witness. If you find that any witness has testified wilfully falsely, you are at liberty to disregard all his testimony unless corroborated by other evidence which you do believe.

Any fact in the case may be proved by direct evidence. Direct evidence is the proof of a fact by an eye witness or a person who was present and who observed that which he testifies to. Indirect evidence is the proof of other facts surrounding the fact in issue which afford an inference or presumption of its existence, but do not directly prove its existence. [176]

You have had some testimony here by deposition. A witness on a deposition is just the same as a witness who has been brought into court. Therefore, you will weigh the testimony of the person who gives the deposition in exactly the same way as you would the testimony of the witness on the stand.

Any evidence that has been received of an act or omission or declaration of a party unfavorable to his own interest should be considered and weighed by you as other evidence; but evidence or oral admission of a party other than his own testimony in the trial should be viewed by you with caution. That instruction relates to parties and witnesses on both sides.

Both the parties have been heard by oral evidence, and two forms of verdict have been prepared for you.

In accordance with the rules of civil procedure, I will allow the jury to retire for a few minutes, gentlemen, if you wish to make any exceptions to the instructions of the Court.

Mr. Schell: I desire that, your Honor.

The Court: Ladies and gentlemen of the jury, you may now retire for a few minutes while we take up a question of law with the attorneys. At the conclusion of that you will be called into Court, and you will be permitted to retire for consideration of your verdict.

Now, gentlemen.

Mr. Barnett: No objection, your Honor.

Mr. Schell: I would like to note the following exceptions, your Honor: First, to the instructions given, I believe, as to damages. I believe they are in error, in that they contemplate reimbursement for all the expenses the plaintiffs necessarily incurred in the purchase of the trucks and everything else, together with loss of profits; in other words, the capital [177] expense, as well as the loss of anticipated profits. I take it that under the evidence, the jury is entitled to believe that plaintiffs would have made no profits during the entire process or period of this four months. Let us concede there was a four months contract for the purpose of this only, and during that four months they would not have made any profits, but would have

operated at a loss. Then they would not be entitled to the return of capital. That generally expresses my objection.

The Court: I think you are correct about that. I think possibly the instruction could carry that implication. I think I will just caution them in that regard, that they cannot award for recovery for capital outlay.

Mr. Schell: I believe, however, not to create the wrong impression now, that you just instruct them on that one thing, and that does not mean they should or should not find.

The other exception I have is that one that we have argued before, that they must have been ready, willing and able to operate beforehand, and have a permit to so operate.

The Court: Yes, you may have that exception. Call back the jury.

(Jury returns to the court room.)

The Court: Ladies and gentlemen of the jury, my attention has been called to one matter in instructing you regarding the recovery of damages. Because I give you instructions on damages does not mean that I think you have to find them, but in instructing you on damages I say that if you find for plaintiffs, then you are entitled to give such damages as would reasonably compensate the plaintiffs for whatever loss or damage they have suffered. Now, I did after that give you two phases of the matter which you might consider, and these are, first, the out- [178] lay, and second, the profit. Obviously you wouldn't duplicate the

damages in considering that. If you give damages for outlay you should not also include that element in assessing profits. You can see if damages were given for capital outlay, then in assessing profits you should take that into consideration.

I just take that up in order that you should have no difficulty in your deliberations. You might have thought the other instruction was possibly confusing.

You will have with you in the jury room the pleadings in the case, and the exhibits and two forms of verdict. In the event that you find that the plaintiff is entitled to recover, then you will fill out the form of verdict, "We, the jury, find in favor of the plaintiffs and against the defendants, and assess damages in the sum of blank dollars." After the defendants you will name the defendant that you find against. As I have indicated before, in my opinion the Macco Construction Company is the only one you should find against, and the blank line there you will fill in with whatever sum under the instructions that the plaintiffs would be entitled, if you find for the plaintiffs.

On the other hand, if you find that the plaintiffs are not entitled to recover you will use this form of verdict, "We, the jury, find in favor of the defendants."

In either event you will have the verdict signed by your foreman. Inasmuch as in the Federal Court the verdict must be unanimous, you will carefully check up to see that you are in unanimous agreement on whatever verdict you will return.

With that, ladies and gentlemen of the jury, you may now retire to deliberate on your verdict.

(The jury retired at 1:03 P. M., and returned at 1:43 P. M.) [179]

The Court: Ladies and gentlemen, I have a communication from you which says, "Can Young & Sons secure a deficiency judgment for \$1500 on any sum allowed the plaintiff?"

I want to say that that was not one of the issues submitted. The issue was whether there was a contract; second, if there was a breach and who was responsible for the breach; and third, the question as to damages. It is true that you have testimony before you which indicates that there is a difference between the sale price and the resale price of the trucks, which if you get to the question of damages you may possibly consider. Otherwise, you have no interest in what happened between Young & Sons and the plaintiffs.

There are many other issues in this case besides the one submitted to you, but the main issue submitted to you is what I gave you in the instructions.

The jury will now retire for further deliberation on its verdict.

(The jury retired at 1:46, and returned at 2:15 P. M.)

The Court: Ladies and gentlemen of the jury, have you arrived at a verdict?

The Foreman: We have, your Honor.

The Court: Pass it up to the Court through the bailiff.

(Verdict handed to the Court.)



The Court: Did you intend to find this verdict against both defendants, or just the one?

The Foreman: Just the one, your Honor.

The Court: I will send it back to you, and you may fill in the defendant's name.

(Document handed to the foreman and back to the Court.)

The Court: It still is in the wrong place. You will [180] have to put it in following the word "Defendant" in the middle of the verdict.

(Verdict handed to Foreman and back to the Court.)

The Court: It is not right. I will re-commit this to you, ladies and gentlemen of the jury, and return a proper verdict. Write one out. Court is in recess.

(Recess.)

The Court: Will you now pass the form of verdict to the Court through the bailiff.

(Verdict handed to the Court.)

The Court: Read the verdict, Mr. Clerk.

The Clerk: Ladies and gentlemen of the jury, harken to your verdict as it shall now stand recorded:

"We the jury, find in favor of the plaintiffs and assess the damages against the defendant Maceo Construction Company in the sum of Twenty-five Hundred Dollars.

"Edward A. Nelson, Foreman."

The Court: Ladies and gentlemen of the jury, the Court thanks you for the attention you have given to the evidence in this case, and discharges you from further service until you are notified.

[Endorsed]: Filed Sep. 3, 1942. [181]

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INSTRUCTIONS TO JURY REQUESTED BY  
DEFENDANT MACCO CONSTRUCTION  
COMPANY

Defendants' Requested Instruction No. . .

You are instructed that the laws of the State of California in force and effect at the time of the transactions involved herein provided that no carrier should engage in the business of transportation of property for compensation by motor vehicle or truck over any public highway, road or street in any city in this State, without having first obtained from the Railroad Commission of the State of California, permit authorizing such operation. By the term "carrier" is meant any person or persons engaged in the transportation of property for compensation or hire by means of a motor vehicle or truck as a business on any public highway, road or street in any city or county in the State of California.

You are therefore instructed that if you find that the plaintiffs, in entering into or performing the contract alleged in this case, engaged in the business of transportation of property for compensation by motor trucks over any such highway, road or

street, but that they did not have such permit from the said Railroad Commission, during the time involved in this litigation, then said alleged contract was illegal and void, and plaintiffs cannot recover in this action and your verdict herein must be for the defendants.

Given:

Given as modified:

Refused:

Judge [183]

Defendants' Requested Instruction No. ...

Before the plaintiffs can recover in this case upon the theory that the defendants failed to employ the use of plaintiffs' trucks for a specified period, the preponderance of the evidence must establish that the plaintiffs were, during said period, ready, able and willing to perform the obligations assumed by them under said contract, that is to say, the preponderance of the evidence must show that the plaintiffs were in a position to supply the defendants with the required number of trucks in proper and suitable condition so that said trucks could perform the work contemplated by the parties at the time the contract was entered into.

Given:

Given as modified:

Refused:

Judge

[Endorsed]: Filed Nov. 13, 1942. [184]

## DEFENDANTS' EXHIBIT "A"

COST OF OPERATING FARR & SINCLAIR TRUCKS  
WHILE WORKING FOR MACCO CONSTRUCTION  
CO. AT BETHLEHEM STEEL CO., SAN FRANCISCO,  
DECEMBER 1940 AND JANUARY 1941.

Income—per hour		2.70
Cost of Operation	Per Hour	Total Costs
Gas—2095 gals. @ .135.....	.447	282.83
Oil and grease.....	.146	91.99
Drivers Comp. ....	.142	89.76
Non-Operating Drivers time and insur- ance .....	.161	101.30
Mechanic & Ins. ....	1.062	670.95
Tires .....	.093	58.99
Parts paid by Macco.....	.044	27.98
Parts—Inv. direct to Farr & Sin- clair, known bills .....	1.132	716.39
	<hr/>	
	3.227	
Net Loss per operated hour		0.527

No allowance in these costs for work performed by either Farr or Sinclair personally, nor for any money expended by them for parts, tires, nor for depreciation of truck or tires.

[Endorsed]: No. 21896-S. Defts. Exhibit No. A.  
Filed March 6, 1942. Walter B. Maling, Clerk. By  
J. P. Welsh, Deputy Clerk.

[Endorsed]: Filed Mar. 6, 1942. [185]

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 PLAINTIFFS' EXHIBIT No. 1

## CONDITIONAL SALE CONTRACT

This Agreement made and entered into this 3rd  
day of December, 1940, by and between Young &

Son Co., Ltd., a corporation, hereinafter termed seller, and A. L. Farr and Robert P. Sinclair, hereinafter termed purchasers, Witnesseth:

That the seller herein hereby agrees to sell and the purchasers herein hereby agree to purchase, subject to the terms and conditions hereof, those certain used six-cylinder Autocar Trucks bearing the following engine and serial numbers:

Engine No.	Serial No.
50616	7065368
50611	7065370
50614	7065465
501684	201897

for the sum of \$3,500.00 in lawful money of the United States, payable as follows: \$875.00, or more, on or before January 4th, 1941, and \$875.00, or more, on or before the 4th day of each month thereafter until said entire purchase price has been paid in full. Purchasers also agree to pay to seller interest upon the unpaid portions of said purchase price at the rate of 6% per annum from date hereof to the date of payment, said interest to be paid on or before four (4) months from date hereof.

It Is Distinctly Understood and Agreed that purchasers are agreeing to purchase said personal property "as is" after a personal inspection thereof by purchasers, and without any warranty, express or implied, as to the age, year model, or mechanical condition of said personal property or as to any other thing. And purchasers do hereby acknowledge and agree that no representations or warranties of any kind have been made to them regarding said

personal property by seller or by anyone acting on its behalf. [186]

Purchasers agree to procure and keep in full force and effect during the life of this contract full and complete collision insurance covering said personal property, with loss, if any, payable to seller as its interests may appear and to cause to be issued and delivered to seller a certificate by the agent of the insurance company writing such insurance stating that such insurance has been secured and paid for and is in effect.

Purchasers hereby acknowlegde the receipt and delivery of all of said personal property in good condition and accept the same without warranty of any kind and agree to at all times maintain the same in good condition and repair, reasonable wear and tear thereof excepted, to properly house and protect the same against the elements, not to take the same out of the State of California without the written consent of seller and not to permit the same to be attached or not to create or permit to be created any *alien*, encumbrances, or adverse claims of any character against the same for storage, repairs, or otherwise, and that they will pay all taxes and assessments of every character levied or assessed against said property or this contract or the indebtedness and transaction represented thereby. Should said property suffer any loss, damage or injury, purchasers nevertheless agree to purchase and pay for said property in full according to the terms hereof.

Purchasers agree that any equipment, repairs or accessories placed upon said property shall become a component part thereof, title thereto shall be vested in seller and included under the terms of this agreement, and any indebtedness therefor, if paid by seller, shall be added to the unpaid deferred balance and become immediately due and payable with interest at the rate of 12% per annum.

Purchasers agree that they will neither use nor permit said property to be used for any unlawful purpose and that they will register, use, operate and control the same in accordance with all statutes, laws, ordinances and regulations relating to the registra- [187] tion, use, operation and control of motor vehicles.

Title to said property shall remain in seller until all payments herein provided for are made and all conditions hereof fully complied with, whereupon seller shall execute to purchasers a good and sufficient transfer of the title to said property and endorse and deliver to purchasers the certificates of ownership issued by the Motor Vehicle Department of the State of California covering said property.

Purchasers agree that seller may at its option accept payments of principal or interest past due, or part payments of moneys due without in any manner modifying the terms of this contract and that such acceptance shall not be construed as a waiver of any subsequent defaults on the part of purchasers.

Possession of said personal property shall give

the purchasers no title or interest therein and no rights thereto except as herein provided. In the event that the purchasers shall return the said property without the consent in writing of the seller, the latter may store the same to the order of purchasers and this contract shall remain in full force and effect.

Should the purchasers fail to make any of the payments herein provided for, or fail to perform any other of the terms or conditions hereof, in the manner or within the time herein specified, the seller or its assignee may, at its option, and without demand or notice of any kind to the purchasers either: (a) Declare all unpaid amounts immediately due and payable and sue therefor, or (b) Retake possession of said property and without notice resell the same at public or private sale and, after deducting all expenses and attorneys' fees incurred therein, credit the net proceeds thereof to the unpaid balance due, and said purchasers agree to pay to seller, or its assignee, any deficiency remaining under this contract after such sale is completed and the net proceeds applied thereon, or (c) Take immediate possession of said property, wherever the same may be found, and without liability for [188] trespass, in which event all of the rights, titles and equities of the purchasers in, to or under said property and this agreement shall forthwith cease and terminate and seller shall be forthwith released from all obligations to transfer title or possession of said property to purchasers. All sums of money theretofore



paid to seller hereunder shall be and remain the property of the seller, not as a penalty but as a compensation for the use by purchasers of said property and for the depreciation thereof. All sums then due and unpaid under the terms hereof shall be forthwith paid to seller by purchasers as further compensation for the use by purchasers of said property.

Seller shall have the right to enforce one or more remedies hereunder, successively or concurrently, and such action shall not operate to estop or prevent the seller from pursuing any further remedy which he may have hereunder, and any repossession or retaking or sale of the property pursuant to the terms hereof shall not operate to release the purchasers until full payment has been made in cash. Purchasers hereby waive the right to remove any legal action from the court originally acquiring jurisdiction.

Purchasers agree to pay the seller any expense incurred in recovering the possession of said property or in collecting any unpaid balance of said purchase price, including reasonable attorneys' fees, which shall not be less than \$100.00.

Time is hereby declared to be of the essence of this agreement and of each and every term, covenant and condition thereof.

This agreement shall inure to the benefit of and shall apply to and bind the heirs, executors, administrators, successors and assigns or purchasers and the successors and assigns of seller.

It is understood and agreed that the seller or its assigns shall not be bound by any agreement or representations not contained [189] in this agreement, which the purchasers agree they have read and understand.

As further security for the payment of the purchase price of said property, purchasers agree to execute and deliver to seller, contemporaneously with the execution of this agreement, an assignment of \$3,500.00 of the moneys to become due and payable to purchasers from Macco Construction Company from the hauling job on the Bethlehem Steel Corporation property in San Francisco, California, the same to be payable at the rate of not less than \$875.00 per month. It is understood, however, that the acceptance of said assignment as further security shall not preclude or delay seller from exercising any of the other rights and options specified in this agreement in the event of default in the payment of any installment of said purchase price or the performance of any other term, covenant or condition of this agreement.

As an inducement and consideration for the execution of this contract by seller, purchasers hereby guarantee that they have secured a contract with Macco Construction Company for hauling at the property of Bethlehem Steel Corporation, San Francisco, California, upon which job the hereinbefore mentioned trucks are to be used and that said contract calls for the payment of \$4.50 per hour for each of said trucks and that the only deductions

which are to be made from said truck hire by Macco Construction Company are the wages of the truck drivers and the gasoline and oil furnished to purchasers by said Macco Construction Company. And purchasers hereby agree to furnish to seller monthly a statement showing the number of hours worked by each of said trucks during the preceding month.

In Witness Whereof the parties hereto have executed these [190] presents the day and year first hereinbefore written, seller by and through its President thereunto duly authorized.

YOUNG & SON CO., LTD.,

By F. E. YOUNG

President

Seller

A. L. FARR

R. P. SINCLAIR

Purchasers [191]

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PLAINTIFFS' EXHIBIT No. 2

In consideration of the making of the within contract by the seller therein named, the undersigned does hereby guarantee payment of all deferred payments as specified therein, and covenants, in default of payment of any installment or performance of any requirement thereof by the purchasers to pay the full amount remaining unpaid to said seller upon demand at 599 Colusa Avenue, Berkeley, California. The liability of the undersigned shall not be affected by any compromise, settlement or any varia-

tion of the terms of said contract effected by or with the purchaser or the seller. The undersigned waives notice of acceptance of this guarantee, notices of nonpayment and nonperformance, and notices of any other kind and nature and waives the right to remove any action brought upon this guarantee from the court originally acquiring jurisdiction. It is understood and agreed, however, that, in the event that the undersigned is called upon to pay to said seller, pursuant to the provisions of this guarantee, from its own funds, any unpaid balance of the purchase price specified in said agreement, upon such payment being made, said seller shall assign and transfer to the undersigned all of its interest in and under said contract.

In Witness Whereof the undersigned has caused these presents to be executed by its officers thereunto duly authorized this ... day of December, 1940.

MACCO CONSTRUCTION  
COMPANY

By .....

President

By .....

Secretary [192]

ASSIGNMENT

For a Valuable Consideration, the receipt whereof is hereby acknowledged, we do hereby assign, transfer and set over unto Young & Son Co., Ltd., a corporation, 599 Colusa Avenue, Berkeley, California,

\$3,500.00 of the first moneys to become due and payable to us from Macco Construction Company under our contract with said Macco Construction Company upon the hauling job at the Bethlehem Steel Corporation property, said sum of \$3,500.00 to be paid in installments of at least \$875.00 per month on or before the 4th day of each month, commencing January 4, 1941, and we do hereby authorize and request said Macco Construction Company to pay said moneys to said Young & Son Co., Ltd., a corporation, and acknowledge and agree that such payments, when so made, shall operate as a full acquittance to said Macco Construction Company of its said obligations to us to the extent of the payments made in accordance with this assignment.

In Witness Whereof we have hereunto set our hands this 3rd day of December, 1940.

A. L. FARR

R. P. SINCLAIR

We Hereby Accept the foregoing assignment and agree to make the payments at the times and in the amounts specified in said assignment. It Is Distinctly Understood and Agreed, however, that we are obligated to make said payments only out of moneys to become due and payable from us to said A. L. Farr and Robert P. Sinclair, and not otherwise, and that if sufficient moneys do not become due and payable to said A. L. Farr and Robert P. Sinclair to make said payments, we shall be obligated to make payments only to the extent of the

moneys actually due and payable from us to said A. L. Farr and Robert P. Sinclair.

In Witness Whereof the undersigned has caused these presents to be executed by its officer thereunto duly authorized.

MACCO CONSTRUCTION  
COMPANY

By BEN F. WILLS

Gen. Supt. [193]

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PLAINTIFFS' EXHIBIT No. 3

CONDITIONAL SALE CONTRACT

This Agreement made and entered into this 3rd day of December, 1940, by and between Young & Son Co., Ltd., a corporation, hereinafter termed seller, and A. L. Farr and Robert P. Sinclair, hereinafter termed purchasers, Witnesseth:

That the seller herein hereby agrees to sell and the purchasers herein hereby agree to purchase, subject to the terms and conditions hereof, those certain used six-cylinder Autocar Trucks bearing the following engine and serial numbers:

Engine No.	Serial No.
50616	7065368
50611	7065370
50614	7065465
501684	201897

for the sum of \$3,500.00 in lawful money of the United States, payable as follows: \$875.00, or more, on or before January 4th, 1941, and \$875.00, or more, on or before the 4th day of each month there-

after until said entire purchase price has been paid in full. Purchasers also agree to pay to seller interest upon the unpaid portions of said purchase price at the rate of 6% per annum from date hereof to the date of payment, said interest to be paid on or before four (4) months from date hereof.

It Is Distinctly Understood and Agreed that purchasers are agreeing to purchase said personal property "as is" after a personal inspection thereof by purchasers, and without any warranty, express or implied, as to the age, year model, or mechanical condition of said personal property or as to any other thing. And purchasers do hereby acknowledge and agree that no representations or warranties of any kind have been made to them regarding said personal property by seller or by anyone acting on its behalf. [194]

Purchasers agree to procure and keep in full force and effect during the life of this contract full and complete collision insurance covering said personal property, with loss, if any, payable to seller as its interests may appear and to cause to be issued and delivered to seller a certificate by the agent of the insurance company writing such insurance stating that such insurance has been secured and paid for and is in effect.

Purchasers hereby acknowledge the receipt and delivery of all of said personal property in good condition and accept the same without warranty of any kind and agree to at all times maintain the same in good condition and repair, reasonable, wear and tear thereof excepted, to properly house and protect

the same against the elements, not to take same out of the State of California without the written consent of seller and not to permit the same to be attached or not to create or permit to be created any lien, encumbrances, or adverse claims of any character against the same for storage, repairs, or otherwise, and that they will pay all taxes and assessments of every character levied or assessed against said property or this contract or the indebtedness and transaction represented thereby. Should said property suffer any loss, damage or injury, purchasers nevertheless agree to purchase and pay for said property in full according to the terms hereof.

Purchasers agree that any equipment, repairs or accessories placed upon said property shall become a component part thereof, title thereto shall be vested in seller and included under the terms of this agreement, and any indebtedness therefor, if paid by seller, shall be added to the unpaid deferred balance and become immediately due and payable with interest at the rate of 12% per annum.

Purchasers agree that they will neither use nor permit said property to be used for any unlawful purpose and that they will register, use, operate and control the same in accordance with all statutes, laws, ordinances and regulations relating to the registration, use, operation and control of motor vehicles.

Title to said property shall remain in seller until all payments herein provided for are made and all conditions hereof fully complied with, whereupon seller shall execute to purchasers a good and suffi-



cient transfer of the title to said property and endorse and deliver to purchasers the certificates of ownership issued by the Motor Vehicle Department of the State of California covering said property.

Purchasers agree that seller may at its option accept payments of principal or interest past due, or part payments of moneys due without in any manner modifying the terms of this contract and that such acceptance shall not be construed as a waiver of any subsequent defaults on the part of purchasers.

Possession of said personal property shall give the purchasers no title or interest therein and no rights thereto except as herein provided. In the event that the purchasers shall return the said property without the consent in writing of the seller, the latter may store the same to the order of purchasers and this contract shall remain in full force and effect.

Should the purchasers fail to make any of the payments herein provided for, or fail to perform any other of the terms or conditions hereof, in the manner or within the time herein specified, the seller or its assignee may, at its option, and without demand or notice of any kind to the purchasers either: (a) Declare all unpaid amounts immediately due and payable and sue therefor, or (b) Retake possession of said property and without notice resell the same at public or private sale and, after deducting all expenses and attorneys' fees incurred therein, credit the net proceeds thereof to the unpaid balance due, and said purchasers agree to pay to seller, or its assignee, any deficiency remaining under this contract

after such sale is completed and the net proceeds applied thereon, or (c) Take immediate possession of said property, wherever the same may be found, and without liability for [196] trespass, in which event all of the rights, titles and equities of the purchasers in, to or under said property and this agreement shall forthwith cease and terminate and seller shall be forthwith released from all obligations to transfer title or possession of said property to purchasers. All sums of money theretofore paid to seller hereunder shall be and remain the property of the seller, not as a penalty but as compensation for the use by purchasers of said property and for the depreciation thereof. All sums then due and unpaid under the terms hereof shall be forthwith paid to seller by purchasers as further compensation for the use by purchasers of said property.

Seller shall have the right to enforce one or more remedies hereunder, successively or concurrently, and such action shall not operate to estop or prevent the seller from pursuing any further remedy which he may have hereunder, and any repossession or retaking or sale of the property pursuant to the terms hereof shall not operate to release the purchasers until full payment has been made in cash. Purchasers hereby waive the right to remove any legal action from the court originally acquiring jurisdiction.

Purchasers agree to pay the seller any expense incurred in recovering the possession of said property or in collecting any unpaid balance of said

purchase price, including reasonable attorneys' fees, which shall not be less than \$100.00.

Time is hereby declared to be of the essence of this agreement and of each and every term, covenant and condition thereof.

This agreement shall inure to the benefit of and shall apply to and bind the heirs, executors, administrators, successors and assigns of purchasers and the successors and assigns of seller.

It is understood and agreed that the seller or its assigns shall not be bound by any agreement or representations not contained [197] in this agreement, which the purchasers agree they have read and understand.

As further security for the payment of the purchase price of said property, purchasers agree to execute and deliver to seller, contemporaneously with the execution of this agreement, an assignment of \$3,500.00 of the moneys to become due and payable to purchasers from Macco Construction Company from the hauling job on the Bethlehem Steel Corporation property in San Francisco, California, the same to be payable at the rate of not less than \$875.00 per month. It is understood, however, that the acceptance of said assignment as further security shall not preclude or delay seller from exercising any of the other rights and options specified in this agreement in the event of default in the payment of any installment of said purchase price or the performance of any other term, covenant or condition of this agreement.

As an inducement and consideration for the execution of this contract by seller, purchasers hereby guarantee that they have secured a contract with Macco Construction Company for hauling at the property of Bethlehem Steel Corporation, San Francisco, California, upon which job the hereinbefore mentioned trucks are to be used and that said contract calls for the payment of \$4.50 per hour for each of said trucks and that the only deductions which are to be made from said truck hire by Macco Construction Company are the wages of the truck drivers and the gasoline and oil furnished to purchasers by said Macco Construction Company. And purchasers hereby agree to furnish to seller monthly a statement showing the number of hours worked by each of said trucks during the preceding month.

In Witness whereof the parties hereto have executed these [198] presents the day and year first hereinbefore written, seller by and through its President thereunto duly authorized.

YOUNG & SON CO., LTD.

By (signed) F. E. YOUNG

President

Seller

(signed) A. L. FARR

(signed) R. P. SINCLAIR

Purchasers

[Endorsed]: Filed March 5, 1942. [199]

[Title of District Court and Cause.]

VERDICT

We, the Jury, find in favor of the Plaintiff and assess the damages against the Defendant Macco Construction Co. in the sum of Twenty-Five Hundred Dollars (\$2500.00).

EDWARD A. NELSON  
Foreman.

[Endorsed]: Filed March 7, 1942. [200]

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[Title of District Court and Cause.]

NOTICE OF MOTIONS UNDER RULE 50(b)  
FEDERAL RULES OF CIVIL PROCEDURE  
TO SET ASIDE VERDICT AND  
ANY JUDGMENT ENTERED THEREON  
AND TO HAVE JUDGMENT ENTERED  
IN ACCORDANCE WITH A MOTION  
FOR DIRECTED VERDICT IN FAVOR  
OF DEFENDANT MACCO CONSTRUCTION  
COMPANY AND IN THE ALTERNATIVE  
FOR A NEW TRIAL.

To the Plaintiff Above Named and to Philip Barnett, Their Attorneys, and to Each of Them:

You and Each of You Will Please Take Notice that the defendant Macco Construction Company, a corporation, has filed in the above entitled matter its written motions under rule 50(b) Federal Rules of Civil Procedure and to set aside verdict and any judgment entered thereon and to have judgment

entered in accordance with a motion for directed verdict in favor of defendant Macco Construction Company and in the alternative for a new trial, copies of which have heretofore been served upon you.

Each of you will please further take notice that the said motions, and each of them will come on for hearing before the above entitled court at a time and place hereinafter to [201] be designated by the above entitled court.

Dated: March 17, 1942.

SCHELL & DELAMER

By W. O. SCHELL

Attorneys for defendant,

Macco Construction Com-  
pany.

(Affidavit of Service.)

[Endorsed]: Filed Mar. 18, 1942. [202]

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[Title of District Court and Cause.]

ORDER DISMISSING COMPLAINT IN  
INTERVENTION.

Young & Son Co., Ltd., a corporation, Intervener in the above-entitled action, through its counsel, J. W. O'Neill, this day moved the Court for an order dismissing the complaint in intervention. Defendant Macco Construction Company opposed the granting of said motion. Said motion was argued in open Court by counsel for Inter-

vener, Plaintiffs, and defendant Macco Construction Company, and submitted to the Court for decision.

It was stipulated in open Court by counsel for Intervener, and it appears to the Court and the Court [203] finds and decides that the assignment by A. L. Farr and R. P. Sinclair to Intervener, which is the basis of the claim against defendant Macco Construction Company set up in said Complaint in Intervention, did not assign to Intervener any moneys which Plaintiffs might recover from defendant Macco Construction Company by way of damages for breach of contract, but only assigned moneys which may have been actually earned by Plaintiffs and due under their contract with Macco Construction Company prior to the 18th day of January, 1941.

It appears to the Court that this Court has no jurisdiction of said Complaint in Intervention, and that it is fair, just and equitable that said motion to dismiss should be granted;

Therefore, It Is Hereby Ordered that the said Complaint in Intervention be, and the same is hereby dismissed, without prejudice, for lack of jurisdiction.

Defendant Macco Construction Company is hereby granted an exception to the foregoing order.

Dated: San Francisco, California, July 8, 1942.

JAMES ALGER FEE

United States District Judge

[Endorsed]: Filed July 8, 1942. [204]

District Court of the United States, Northern District of California, Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Wednesday, the 8th day of July, in the year of our Lord one thousand nine hundred and forty-two.

Present: the Honorable James Alger Fee, District Judge.

No. 21896-S Civil

[Title of Cause.]

After hearing the arguments of Phillip Barnett, Esq., on behalf of the plaintiffs, Walter Schell, Esq., on behalf of the defendant Macco Construction Co., and J. W. O'Neill, Esq., on behalf of the intervenor, it is, as will more fully appear in orders this day signed and filed, Ordered: That the complaint in intervention of Young & Son Co., Ltd., be dismissed without prejudice for lack of jurisdiction; that this action be dismissed as to the defendants Ben F. Wells, John Doe, Richard Roe, and Black & White Co.; that the motion of the defendant Macco Construction Co. for judgment notwithstanding the verdict be denied; that the motion of the plaintiffs for the entry of judgment is granted and that judgment be entered in favor of plaintiffs for \$2500.00, together with costs; that



the motion of the defendant Macco Construction Co. for a new trial be denied and an exception allowed, and that the defendant Macco Construction Co. may have a ten-day stay of execution. [205]

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In the District Court of the United States, Northern District of California, Southern Division

No. 21896-S

A. L. FARR and R. P. SINCLAIR,

Plaintiffs,

vs.

MACCO CONSTRUCTION COMPANY, a corporation, BEN F. WELLS, et al.

Defendants.

### JUDGMENT ON VERDICT

This cause having come on regularly for trial on March 5, being a day in the March, 1942, term of said Court, before the above entitled court, and a jury of twelve persons duly impaneled and sworn to try the issues joined herein, Phillip Barnett, Esq., appearing as attorney for the plaintiffs and Schell & Delamer, Esqs. by Walter Schell, Esq., appearing as the attorneys for the defendants and the trial having been proceeded with on the 5th, 6th and 7th days of March in said year, and term, and oral and documentary evidence on behalf of the respective parties having been introduced and

closed, and the cause, after arguments by the attorneys and instructions by the court having been submitted to the jury and the jury having subsequently rendered the following verdict which was ordered recorded, namely: [206] “We, the jury find in favor of the plaintiff and assess the damages against the defendant in the sum of Twenty-five Hundred Dollars and no cents; Edward A. Nelson, foreman,” and the Court having ordered that judgment be entered herein in accordance with said verdict and for costs;

Now, Therefore, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that said plaintiffs do have and recover of and from said defendants the sum of Twenty-five Hundred Dollars and no cents, together with his costs herein expended, taxed at \$109.25.

Dated: July 8th, 1942.

JAMES ALGER FEE

Judge.

[Endorsed]: Filed Jul. 8, 1942. [207]

[Title of District Court and Cause.]

NOTICE OF ENTRY OF JUDGMENT

To the Defendants Above Named and to Messrs.  
Schell & Delamer, their attorneys:

You and Each of You Will Please Take Notice  
that on Wednesday, the 8th day of July,  
1942, judgment for Twenty-five Hundred Dollars  
(\$2500.00) plus costs was entered in favor of the  
plaintiffs and against the defendant Macco Con-  
struction Company, pursuant to the Order of  
Judge Fee.

Dated: June 8, 1942.

PHILLIP BARNETT

Attorney for Plaintiffs.

[Endorsed]: Filed Jul. 9, 1942. [208]

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[Title of District Court and Cause.]

NOTICE OF APPEAL

To Plaintiffs, A. L. Farr and R. P. Sinclair, and  
to Phillip Barnett Their Attorney; 111 Sut-  
ter Street, San Francisco, California; and  
To Intervener, Young & Son Co., Ltd., a Corpora-  
tion, and to J. W. O'Neill Its Attorney, 1101  
Central Bank Building, Oakland, California:  
Notice Is Hereby Given That Macco Construc-  
tion Company, a corporation, one of the defendants  
herein, does hereby appeal to the United States

Circuit Court of Appeals for the Ninth Circuit  
from the final Judgment entered in the within ac-  
tion on the 8th day of [209] July, 1942.

Dated this 28th day of August, 1942.

SCHELL & DELAMER

By GERALD F. H. DELAMER

Attorneys for Defendant and  
Appellant, Macco Con-  
struction Company, a Cor-  
poration.

Suite 1212 Bartlett Building,  
215 West Seventh Street,  
Los Angeles, California.

CERTIFICATE.

I Do Hereby Certify that the copy of the fore-  
going notice of appeal was mailed on the ..... day  
of ....., 1942, to Phillip Barnett, Esq.,  
111 Sutter Street, San Francisco, California, at-  
torney for plaintiffs, A. L. Farr and R. P. Sinclair,  
and to J. W. O'Neill, Esq., 1101 Central Bank  
Building, Oakland, California, attorney for in-  
tervener, Young & Son Co., Ltd., a corporation.

WALTER B. MAILING,

Clerk of the United States  
District Court.

By .....

Deputy Clerk

[Endorsed]: Filed Aug. 31, 1942. [210]

In the District Court of the United States, Northern District of California, Southern Division

No. 21896 S

A. F. FARR, R. P. SINCLAIR,

Plaintiffs,

vs.

MACCO CONSTRUCTION COMPANY, a corporation, BEN F. WELLS, JOHN DOE, RICHARD ROE, BLACK AND WHITE COMPANY,

Defendants.

YOUNG & SON, CO., LTD., a corporation,

Intervener.

### DESIGNATION OF RECORD ON APPEAL

To the Clerk of the District Court of the United States, Northern District of California, Southern Division:

You Will Please prepare a transcript of the record in this case, to be used upon appeal in the above entitled cause, embodying the following:

1. Complaint;
2. Petition for removal to Federal Court;
3. Affidavit of Ben F. Wells, in support of petition for removal;
4. Bond on removal;
5. Notice of filing petition for and of motion for [211] order of removal;
6. Order for removal;

7. Notice of filing record in United States District Court;

8. Answer of defendant, Macco Construction Company, a corporation, to plaintiffs' complaint;

9. Notice of demand for trial by jury;

10. Reporter's transcript of testimony (of which two copies have heretofore been filed with you);

11. Plaintiffs' Exhibit No. 4 and defendants' Exhibit "A";

12. Instructions to the jury requested by defendant, Macco Construction Company, and not given to the jury by the court;

13. Verdict of the jury;

14. Notice of motion under rule 50(b) of the Federal Rules of Civil Procedure to set aside verdict and any judgment entered thereon and to have judgment entered in accordance with a motion for directed verdict in favor of defendant Macco Construction Company, and in the alternative for a new trial;

15. Motion to dismiss by defendants Macco Construction Company and Ben F. Wells;

16. Order dismissing complaint in intervention of Young & Son Co., Ltd., without prejudice for lack of jurisdiction, dismissing case as to defendant, Ben F. Wells, John Doe, Richard Roe, and Black and White Company, denying motion of defendant, Macco Construction Company for judgment notwithstanding the verdict, granting motion of plaintiffs for entry of judgment, ordering judgment in favor of plaintiffs for \$2500 together with costs, denying motion of defendant Macco Con-

struction Company for new trial and granting defendant, Macco Construction Company, a ten day stay of execution;

17. Judgment of the court; [212]
18. Notice of entry of judgment;
19. Notice of appeal;
20. Designation of record on appeal;
21. Statement of the points upon which appellant intends to rely in the appeal of this case;
22. Clerk's certificate.

Dated: August 28th, 1942.

SCHELL & DELAMER

By GERALD F. H. DELAMER

Attorneys for Defendant and  
Appellant, Macco Construction Company.

[Endorsed]: Filed Aug. 31, 1942. [213]

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[Title of Court and Cause.]

PLAINTIFFS' COUNTER AND ADDITIONAL  
DESIGNATION OF RECORD ON APPEAL

To the Clerk of the District Court of the United  
States, Northern District of California, Southern  
Division:

In addition to the Defendants' Designation on  
Appeal you will please prepare and include in said  
Transcript of Record in this case the following:

1. Plaintiffs' Exhibits Numbers 1, 2, and 3.

2. Memorandum of Plaintiffs' Points and Authorities to Enter Judgment on Verdict and in Opposition to Defendants' Motion for Judgment Notwithstanding Verdict and for a New Trial.

3. Plaintiffs' Exhibit Number 4, Daily Truck Reports.

Dated: September 1, 1942.

PHILLIP BARNETT

Attorney for Plaintiffs and  
Respondents.

State of California,  
City and County of San Francisco—ss.

P. Babcock, being first duly sworn, deposes and says:

That she is a citizen of the United States, over 18 years of age, a resident of San Francisco City and County, and not a party to the within action; that affiant's business address is Room 1414, 111 Sutter Street, San Francisco; that affiant served a copy of the attached Plaintiffs' Counter and Additional Designation of Record on Appeal by placing said copy in an envelope addressed to Messrs. Schell [214] & Delamer, Attorneys at Law, 215 West Seventh Street, Los Angeles, California, which envelope was then sealed and postage fully prepaid thereon, and thereafter was on September 2, 1942, deposited in the United States mail at San Francisco, California; that there is delivery service by United States mail at the place so addressed, or regular communication by United States mail



between the place of mailing and the place so addressed.

P. BABCOCK

Subscribed and sworn to before me this 2nd day of September, 1942.

[Seal] VIOLET NEUENBURG

Notary Public in and for the City and County of San Francisco, State of California.

My Commission Expires December 31, 1942.

[Endorsed]: Filed Sep. 3, 1942. [215]

---

[Title of District Court and Cause.]

STATEMENT OF POINTS UPON WHICH  
APPELLANT INTENDS TO RELY IN  
THE APPEAL OF THIS CASE

I.

That the judgment is contrary to law in that:

1. Said judgment purports to permit recovery by the plaintiffs for damages and for alleged breach by the defendant Macco Construction Company of an alleged contract which, in fact, was not in existence at the time of the alleged breach.

2. Said judgment purports to give plaintiffs an award of damages for an alleged breach of a contract by Macco Construction Company whereas, in fact, said defendant never did breach said contract.

3. Said judgment purports to give plaintiff's

recovery [216] in damages for an alleged breach by Macco Construction Company of an alleged contract which if in fact had existed between the parties would have been void and *unforceable* under the applicable laws of the State of California.

4. Said judgment is contrary to the applicable laws of the State of California.

## II.

That the evidence is insufficient to sustain the verdict of the jury and the judgment in this case in that the evidence establishes:

1. That whatever were the terms of the original contract prior to any alleged breach thereof by the defendant Macco Construction Company, a novation thereof took place between said parties whereby a new contract was substituted for said original contract, and said new contract was for general hauling without the specification of any definite period for such hauling.

2. That at no time during the existence of any contract between plaintiffs and defendant Macco Construction Company did the plaintiffs have the necessary equipment or maintain their trucks in such mechanical condition as to be able properly to perform the work required of them under the contract with the defendant Macco Construction Company, and said defendant was therefore justified in notifying plaintiffs that their services under such contract were terminated.

3. That whatever contract existed between plaintiffs and defendant Macco Construction Company

involved the transportation by the plaintiffs of property over the public highways of the State of California, but that plaintiffs at no time had the license or permit so to do required by the City Carriers' Act of the State of California, Act 5134 Deering's General Laws of the State of California, and that said contract was therefore void and [217] unenforceable by plaintiffs.

4. That whatever contract existed between plaintiffs and said defendant, plaintiffs, in fact, did under the terms thereof transport property over the public highways of the State of California, but that plaintiffs at no time had the license or permit so to do as required by said City Carriers' Act and that said contract was therefore void and unenforceable by plaintiffs.

5. That plaintiffs sustained no damages whatsoever by reason of the alleged breach of contract upon the part of defendants.

6. That even if plaintiffs sustained any damages by reason of the alleged breach of contract upon the part of the defendants, the amount of said recovery does not belong to plaintiffs, but has heretofore been assigned by them to intervener, Young & Son Co., Ltd., a corporation.

7. That even if plaintiffs sustained damages by reason of the alleged breach of contract upon the part of the defendants, and said amount is payable to plaintiffs, the amount thereof is much less than the amount of the verdict and judgment in this case.

## III.

That the trial court permitted prejudicial error:

1. In denying the motion of defendant Macco Construction Company for a directed verdict in its favor and against the plaintiffs, in that the evidence as hereinabove specified was insufficient to show any right of recovery in plaintiffs against said defendant.

2. In denying the motion of defendant Macco Construction Company under Rule 50(b) of the Federal Rules of Civil Procedure to set aside the verdict and to have judgment entered in accordance with the motion for directed verdict of said defendant Macco Construction Company in its favor and against the plaintiffs, in that the evidence as hereinabove specified was insufficient to show any right of recovery in plaintiffs against said defendant. [218]

3. In denying the motion of the defendant Macco Construction Company for a new trial, in that the evidence as hereinabove specified was insufficient to show any right of recovery in plaintiffs against said defendant.

4. In failing to instruct the jury as requested by defendant, Macco Construction Company, that plaintiffs could not recover unless they were ready, able and willing to perform the obligations assumed by them under the contract upon which they based their right to recovery.

5. In failing to give the instruction requested by the defendant Macco Construction Company that

the laws of the State of California provided that no carrier should engage in the business of transportation of property for compensation by Motor Vehicle or truck over any public highway, road or street in any city in the State of California, without first having obtained from the Railroad Commission of the State of California a permit authorizing such operation, and further instructing the jury that if the plaintiffs in entering into or performing said contract engaged in such business without such permit, said alleged contract was illegal and void and plaintiffs could not recover in this action.

Dated: August 28th, 1942.

SCHELL & DELAMER

By GERALD F. H. DELAMER

Attorneys for Defendant and  
Appellant Macco Construction Company.

[Endorsed]: Filed Aug. 31, 1942. [219]

---

[Title of District Court and Cause.]

OBJECTIONS OF DEFENDANT AND APPELLANT MACCO CONSTRUCTION COMPANY, A CORPORATION, TO PLAINTIFFS' COUNTER AND ADDITIONAL DESIGNATION OF RECORD ON APPEAL

Comes now defendant and appellant, Macco Construction Company and files this its written objec-

tions to plaintiffs' counter and additional designation of record on appeal, to wit, said defendant and appellant objects to the inclusion in the transcript of record on appeal in this case of:

1. Any of plaintiffs' Exhibits Numbers 1, 2, 3 and 4, on the ground that said Exhibits, and each of them, are immaterial in the determination of the questions raised by appellant on this appeal.

2. The memorandum of plaintiffs' points and authorities to enter judgment on verdict and in opposition of defendants' motion for judgment notwithstanding verdict and for new trial, on the ground that said document is immaterial to any of the points involved [220] in this appeal and on the further ground that said document does not consist of any part of the records, proceedings or evidence in this case.

Dated: September 3, 1942.

**SHELL & DELAMER**

**By GERALD F. H. DELAMER**

Attorneys for Macco Construction Company, defendant and appellant

[Endorsed]: Filed Sept. 4, 1942. [221]

In the District Court of the United States,  
Northern District of California,  
Southern Division

No. 21896 S

A. L. FARR, R. P. SINCLAIR,

Plaintiffs,

vs.

MACCO CONSTRUCTION COMPANY, a corporation,  
et al.,

Defendants.

STIPULATION CONCERNING RECORD  
ON APPEAL

It Is Hereby Stipulated by and between the plaintiffs and respondents and the defendant and appellant, Macco Construction Company, a corporation:

1. That the daily truck reports comprising plaintiffs' Exhibit No. 4 in the above entitled matter were made out by the respective drivers of the respective trucks referred to therein at the end of each shift, and that they show the total number of hours worked by said trucks was six hundred ninety-five and one-half ( $695\frac{1}{2}$ ) hours, with down time during said working hours of sixty-one and one-half ( $61\frac{1}{2}$ ) hours, leaving a total number of net hours of six hundred thirty-four (634).

2. That in addition thereto, plaintiffs' trucks worked thirty-eight (38) hours on said job prior

to the period when said slips were put into use.  
[222]

3. That on certain of said slips comments were made as to the condition of the truck and the need of repairs, but that others of said slips contained no such comments.

4. That attached hereto, as illustrative of said slips, are two slips, one containing such comments and one not containing any such comments.

5. That this stipulation, including the illustrative copies of said slips attached hereto, may and shall form a part of the record upon appeal in this case.

6. That in the record on appeal this stipulation may take the place of plaintiffs' Exhibit 4, and that said Exhibit therefore be not included in said record.

Dated: October 27th, 1942.

PHILLIP BARNETT

Attorney for plaintiffs and  
respondents

SHELL & DELAMER,

By WALTER O. SHELL

Attorneys for defendant and  
appellant, Macco Construc-  
tion Company.

[Endorsed]: Filed Oct. 27, 1942. [223]



[Title of District Court and Cause.]

STIPULATION CONCERNING RECORD  
ON APPEAL

It Is Hereby Stipulated by and between the plaintiffs and respondents and the defendant and appellant Macco Construction Company, a corporation, that the Memorandum of Plaintiffs' Points and Authorities to enter Judgment on the Verdict, and in Opposition to Defendant's Motion for Judgment Notwithstanding Verdict and for a New Trial, being Item 2 of Plaintiffs' Counter and Additional Designation of Record on Appeal, may be eliminated from the record on appeal in the above entitled matter.

It Is Further Stipulated that in the event that the use of said Memorandum is required, it may be incorporated into the [224] record by either party without further order of Court.

Dated: October 27th, 1942.

PHILLIP BARNETT,

Attorney for Plaintiffs and  
Respondents.

SCHELL & DELAMER,

By WALTER O. SCHELL,

Attorney for defendant and  
Appellant Macco Construc-  
tion Co.

[Endorsed]: Filed Oct. 27, 1942. [225]

[Title of Court and Cause.]

ORDER EXTENDING TIME TO DOCKET  
APPEAL

Upon application of the defendant and appellant, Macco Construction Company, in the above entitled matter, therefor, on reading the affidavit of W. O. Schell, Esq., filed in support thereof, and good cause therefore appearing:

It Is Hereby Ordered that defendant's time to file, in the Circuit Court of Appeals for the Ninth Circuit, the record on appeal and to cause the said action to be docketed in said Circuit Court of Appeals, is hereby extended to and including the 10th day of November, 1942.

Dated: October 2, 1942.

A. F. ST. SURE,  
Judge.

[Endorsed]: Filed Oct. 3, 1942. [226]

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[Title of District Court and Cause.]

ORDER EXTENDING TIME TO DOCKET  
APPEAL

Upon application of the defendant and appellant, Macco Construction Company, in the above entitled matter, therefor, on reading the affidavit of W. O. Schell, Esq., and the stipulation of the above named plaintiffs and defendant filed in support thereof, and good cause therefore appearing:

It Is Hereby Ordered that defendant's time to file, in the Circuit Court of Appeals for the Ninth Circuit, the record on appeal and to cause the said action to be docketed in said Circuit Court of Appeals, is hereby extended to and including the 24th day of November, 1942.

Dated: November 10, 1942.

(Signed) A. F. ST. SURE,  
Judge.

[Endorsed]: Filed Nov. 10, 1942. [227]

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District Court of the United States  
Northern District of California

CERTIFICATE OF CLERK TO TRANSCRIPT  
OF RECORD ON APPEAL

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 227 pages, numbered from 1 to 227, inclusive, contain a full, true, and correct transcript of the records and proceedings in the case of A. L. Farr et al., Plaintiff, vs. Macco Construction Company, a corporation, et al., No. 21896-S, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of Seven Dollars and Fifty-five Cents (\$7.55) and that the said amount has been paid to me by the Attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 20th day of November A. D. 1942.

[Seal]

WALTER B. MALING,

Clerk

WM. J. CROSBY,

Deputy Clerk. [228]

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[Endorsed]: No. 10312. United States Circuit Court of Appeals for the Ninth Circuit. Macco Construction Company, a corporation, Appellant, vs. A. L. Farr, R. P. Sinclair and Young & Son Co., Ltd., a corporation, Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed November 23, 1942.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

In the United States Circuit Court of Appeals  
for the Ninth Circuit

No. 21896-S

C.C.A. No. 10312

A. L. FARR, R. P. SINCLAIR,  
Plaintiffs and Respondents,

vs.

MACCO CONSTRUCTION COMPANY, a cor-  
poration,  
Defendant and Appellant.

STATEMENT OF POINTS AND  
DESIGNATION OF RECORD

Appellant, Macco Construction Company, a corporation, does hereby formally adopt the statement of points upon which appellant intends to rely in the appeal of this case filed by it in the above entitled case with the Clerk of the United States District Court, Northern District of California, Southern Division, as appellant's statement of points upon this appeal.

Appellant, Macco Construction Company, a corporation, does hereby designate as necessary for the consideration of appellant's points upon this appeal the entire record in the above case as certified to the Circuit Court of Appeals for the Ninth Circuit by said District Court.

Dated: October 1, 1942.

SCHELL & DELAMER

By GERALD F. H. DELAMER

Attorneys for defendant and  
appellant, Macco Construc-  
tion Company.

[Endorsed]: Filed Nov. 23, 1942.

No. 10312.

IN THE  
United States Circuit Court of Appeals  
FOR THE NINTH CIRCUIT

---

MACCO CONSTRUCTION COMPANY, a corporation,

*Appellant,*

*vs.*

A. L. FARR, R. P. SINCLAIR and YOUNG & SON CO., LTD.,  
a corporation,

*Appellees.*

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APPELLANT'S OPENING BRIEF.

---

WALTER O. SCHELL,

GERALD F. H. DELAMAR,

215 West Seventh Street, Los Angeles,

*Attorneys for Appellant.*

FILED

JAN 13 1943

PAUL P. O'BRIEN,

Parker & Baird Company, Law Printers, Los Angeles

CLERK





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No. 10312.

IN THE

United States Circuit Court of Appeals  
FOR THE NINTH CIRCUIT

---

MACCO CONSTRUCTION COMPANY, a corporation,

*Appellant,*

*vs.*

A. L. FARR, R. P. SINCLAIR and YOUNG & SON CO., LTD.,  
a corporation,

*Appellees.*

---

**APPELLANT'S OPENING BRIEF.**

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Unless otherwise noted all references herein are to pages of the printed transcript of record.

**I.**

**Statement of Pleadings.**

This case originated with the filing of a complaint in the Superior Court in the State of California, in and for the City and County of San Francisco.

The complaint alleged that on or about the 3rd day of December, 1940, the defendants entered into an oral contract with plaintiffs whereby the latter agreed to furnish four automobile trucks and the personal services of plaintiffs in the operation of the same, and the defendants

agreed to hire the exclusive personal services of said plaintiffs and said truck equipment for the entire duration of a certain grading and excavating project of the defendants; that on or about the 18th day of January, 1941, the defendants, without cause, discharged the plaintiffs and refused to allow the plaintiffs to continue performance of the said contract, and that thereby the plaintiffs were damaged in the sum of \$6700.00 as set forth in said complaint.

On motion of the defendants Macco Construction Company, said cause was removed to the District Court of the United States, Northern District of California, Southern Division, upon the ground that a separate controversy existed between the plaintiffs and Macco Construction Company, and that a diversity of citizenship existed between the plaintiffs and said defendant.

The defendant Macco Construction Company, hereinafter referred to as the "defendant," filed its answer admitting that on or about the 3rd day of December, 1940, it entered into an oral agreement with the plaintiffs whereby the plaintiffs agreed to furnish four automobile trucks and the personal services of the plaintiffs in the operation of the same, and that it agreed to hire the personal services of the plaintiffs and said truck equipment. The answer, however, denied that the agreement was for the hiring of said or any trucks, or said or any personal services for the entire duration of said project or for any other specified time. The answer alleged that the agreement for the hiring of said trucks and said personal services was merely for such time as the defendant desired to avail itself thereof in connection with said project. The answer admitted that on or about the 18th day of January, 1941, the defendant ceased to desire to avail itself of said services of the plaintiffs or of said truck equipment and thereupon



terminated the said agreement. The answer denied the damages alleged in the complaint.

As a second, separate defense the answer alleged that the trucks and each of them furnished by the plaintiffs were not in good or serviceable or workable condition, and that the plaintiffs did not maintain them in good, serviceable or workable condition, and that prior to the 18th day of January the plaintiffs breached the said agreement by reason of the defective condition in which they maintained said trucks.

The answer alleged in a third defense that by reason of the defective and unserviceable condition of said trucks the consideration to the defendant for the entering into of the said agreement of hiring failed in a material part.

As a fourth defense the answer alleged that prior to the commencement of the action the plaintiffs had assigned all of their right, title and interest in and to any recovery to which they, or either of them, might be entitled against the defendant, to Young & Sons Company, Ltd., a corporation, and that said corporation was the owner of all such right, title and interest of the plaintiffs, or either of them, and plaintiffs did not have legal capacity to maintain the action.

A jury trial was had. At the conclusion of plaintiffs' case the defendant made a motion to dismiss, which motion was denied [pp. 29-31]. At the conclusion of the trial the defendant made a motion for a directed verdict in its favor, which motion was denied and exception allowed [pp. 201-202]. The jury then returned a verdict in favor of the plaintiffs in the sum of \$2500.00 [pp. 201-202].

The defendant then filed its notice of motion under Rule 50 B, Federal Rules of Civil Procedure, to set aside the

verdict and any judgment entered thereon and to have judgment entered in accordance with said directed verdict and in favor of defendant and in the alternative for a new trial. Said motions and each of them were denied [pp. 241-244]. A final judgment was entered in favor of the plaintiffs and against this defendant for \$2500.00, plus costs taxed at the sum of \$109.25 [pp. 245-246].

Within the time allowed by law this defendant filed its notice of appeal [pp. 247-248].

## II.

### Jurisdiction.

The jurisdiction of the District Court was based upon diversity of citizenship (28 *U. S. C. A.*, Sec. 41) and the Circuit Court of Appeals has jurisdiction to review the judgment rendered by said District Court. (28 *U. S. C. A.*, Sec. 225.)

## III.

### Statement of the Case.

#### (a) CONTRACT OF EMPLOYMENT.

The plaintiff Farr testified that having learned that the defendant Macco Construction Company had a contract on what is known as the Bethlehem Steel job, he endeavored to see Mr. Wells of the defendant company but could not do so. However, he and his partner, Sinclair, met Wells at the Palace Hotel the next evening. Wells asked about plaintiffs' equipment. Plaintiffs told him that they had in mind purchasing four Autocar trucks of seven cubic yard capacity but which would handle eight yards; that these trucks were in good condition and had Heil hoists. Wells stated that the employment was to be at the Railroad

Commission rates, that is, \$2.70 per hour, and the defendant would take care of the drivers' payroll and compensation insurance. Plaintiffs asked Wells how long the job would last and he said four months or 120 working days. Nothing else was said in reference to plaintiffs' employment except that Wells said the equipment sounded interesting, and that plaintiffs would be welcome to go to work for the defendant on another job after the Bethlehem Steel job was over. This conversation took place in the last part of November, 1940 [pp. 50-53].

Plaintiff Farr further testified that some days later he had another conversation with Wells who said he was not sure how many trucks he would hire but for plaintiffs to contact him in three or four days [p. 53].

Plaintiff Sinclair testified that at their conference with Wells, plaintiff Farr did most of the talking; that he asked Wells if he were interested in renting trucks, explaining that the trucks they had in mind were Autocars having a capacity of almost seven cubic yards, water level; that they asked Wells very directly about the length of the job; that Wells said the job would last four months and assured them that the trucks would work the whole four months; that plaintiffs explained that they were buying the trucks on the strength of the contract with the defendant and would not consider purchasing them unless they were sure of working the trucks the entire four months [pp. 74-75, 76, 79].

Sinclair also testified that at this conversation Wells said that the defendant's trucks were going to be in San Diego; that he was glad to get the plaintiffs' trucks and asked them if they knew anyone else who had any idle trucks; that Wells assured them that the trucks would

work the whole four months and that when the job was over plaintiffs could follow defendant around as it had many jobs all over the coast [pp. 76-79]; and that at that time plaintiffs had a guarantee with them in the sum of \$750.00 per month which Wells promised to sign if the amount were changed from \$750.00 to \$500.00 per month [pp. 76-77].

Sinclair, however, also testified that at this conversation Wells stated he probably would be interested in renting plaintiffs' trucks as soon as he learned whether or not Macco's trucks were going to San Diego [p. 75]. He testified that Wells said he was interested in plaintiffs' trucks and to contact him in a few days [p. 75].

Plaintiff Sinclair testified that he did contact Wells in a few days but that Wells again would not give him a final answer [p. 75].

Plaintiff Sinclair testified that later Wells did give them a final answer, telling them that they could consider themselves hired [p. 76].

Plaintiff Sinclair testified that they took the guarantee changed to \$500.00 per month to Wells who said he had not the authority to sign it but that subsequently, and a few days after the last above conversation, Wells did sign an acceptance of an assignment, which then read for \$875.00 a month [Ptf. Ex. 3, pp. 76, 77, 78].

Witness Wells, the construction superintendent of the defendant, testified on a deposition taken by plaintiffs, that he hired some trucks from the plaintiffs and that he thinks he told them that the job would take about sixty days; that, however, it was not until they brought in a guarantee that he knew they were buying the trucks; that they then told him they were going to buy the trucks for that par-

ticular job and how much they were going to pay for them; that he told them that they could not make that much out of the job; that they brought a guarantee for him to sign and he told them he would not and did not have the authority to sign it [pp. 178, 179-180, 181, 187-189]. He testified positively that plaintiffs were not hired for any definite period of time [p. 191]. He testified that the job actually lasted 54 to 55 working days [p. 187].

(b) THE ASSIGNMENT TO YOUNG & SONS.

The assignment by plaintiffs to Young & Sons was an assignment of \$3500.00 of the first moneys due plaintiffs from defendant. It was to be paid at the rate of \$875.00 per month commencing January 4, 1941. It was coupled with an authority and a request to the defendant to make such payments to Young & Sons [pp. 232-233].

Mr. O'Neil, attorney for Young & Sons, testified that he discussed with Mr. Wells the acceptance of this assignment by the defendant. Wells stated that the defendant would not guarantee any payments to plaintiffs and would accept the assignment only in so far as any money actually became due plaintiffs from defendant [p. 45].

The form of this acceptance is set forth on pages 233-234 of the printed transcript of record and is as follows:

“We Hereby Accept the foregoing assignment and agree to make the payments at the times and in the amounts specified in said assignment. It Is Distinctly Understood and Agreed, however, that we are obligated to make said payments only out of moneys to become due and payable from us to said A. L. Farr and Robert P. Sinclair, and not otherwise, and that if sufficient moneys do not become due and payable to said A. L. Farr and Robert P. Sinclair to make said

payments, we shall be obligated to make payments only to the extent of the moneys actually due and payable from us to said A. L. Farr and Robert P. Sinclair.”

(c) THE TERMS OF THE AGREEMENT.

Except as to the question of the duration of the employment there was no dispute in the evidence as to the terms of the agreement entered into between the parties. Farr and Sinclair were to continue to operate their own business and neither was to become an employee of the defendant [pp. 58-101]. They were to be paid Railroad Commission rates, that is, \$2.70 per hour per truck for the time the truck actually worked [p. 117], and in addition thereto, the defendant was to pay the wages of the truck drivers at the union scale, namely, \$9.00 for seven hours [p. 118].

The defendant was also to advance for plaintiffs' account, plaintiffs' mechanics Workmen's Compensation Insurance premiums and Social Security tax. It also supplied gasoline and everything for the operation of the trucks [p. 62]. All the items mentioned in this paragraph, however, were to be and were charged back to the plaintiffs.

Plaintiffs were to furnish all repair parts and maintain the trucks and to pay for all operating expenses thereof. They also were to furnish their own services at no extra pay [p. 82].

(d) WORK WHICH WAS TO BE DONE.

Again there is no dispute in the evidence as to what constituted the work that was to be done. It consisted of the removal of a hill along the west side of the so-called

Risdon property and required the removal of about 615,000 cubic yards of dirt [pp. 33-34]. At the start 2,000 feet were to be hauled on to the Bethlehem property. The remainder was to be hauled to Western Pacific dump on Third Street and not on the Bethlehem property. This dump was some four thousand feet from the hill which was being removed [pp. 149-150, 155, 166].

The plaintiffs had no permit from the Railroad Commission of the State of California for the hauling of property over any public highway [pp. 120-123].

After the defendant had rested its case and on redirect examination, plaintiff Sinclair testified that when the agreement with the defendant was entered into, Wells stated that the whole job was to be on private property at the Bethlehem Company and that Wells said they were going to put the dirt on barges and take it to Alameda [p. 187].

Plaintiff Farr was not called on redirect and at no time gave any similar testimony.

#### (e) CONDITION OF PLAINTIFFS' TRUCKS.

There is considerable conflict in the evidence as to the condition and serviceability of the plaintiffs' trucks. The plaintiffs and their witness Thiel testified that the trucks were in good condition when received from Young & Sons, when the work on the job started, and when their work thereon was terminated [pp. 54, 66, 68, 81].

However, plaintiff Farr admitted that the trucks were equipped with open cabs without doors [p. 62] and that he had one complaint from the driver that the truck was unsafe because the brakes were in bad condition. He testified that the brakes on this truck were immediately relined [pp. 63-64].

Plaintiffs' witness Thiel testified that just a few of the four trucks required major overhauling and that either one or two of them required the installation of new rear ends [p. 69].

Plaintiff Sinclair admitted that they had quite a lot of trouble with the trucks; that the fan belts, radiator hoses and generators were bad, and that they had to replace these parts; that they also relined the brakes on one truck and had the hoist overhauled [p. 81].

The total price of the trucks was \$3500.00 [pp. 224-225], yet plaintiffs spent \$700.00 fixing them up and in addition \$400.00 for new tires and things of that sort [p. 96].

On the other hand the defendant's witnesses Gearhardt [pp. 124-130], Crawford [pp. 130-134], Meinn [pp. 134-136], Carlson [pp. 137-139], Keenan [pp. 139-140], Burch [pp. 140-142, 143-145], Tucker [p. 150] and Wells [pp. 184-186, 191] all testified that the trucks were in bad condition, were not serviceable and were dangerous to operate.

#### (f) WORK DONE ON THE JOB.

The defendant's work was to start on November 16th and to be completed by April 8th. It, however, was not actually started until December 9th and was completed on April 16 [pp. 35, 38, 169]. The complete job took 55 1/6 days, plus eight days of cleaning up time. These latter, however, being short days and only equivalent to three full days [pp. 169-172].

Plaintiffs started work on December 9th [pp. 54, 57, 81].

Plaintiff Farr testified that the trucks were on the job at all times twenty-four hours a day from then on until January 18th [p. 55].



He also testified that trouble developed the first day [p. 59]; that he *thinks* all the trucks worked the first day but didn't know whether the truck known as No. 44 worked that day and didn't know if the trucks worked the next day [pp. 57, 58].

Plaintiff Sinclair testified that the trucks worked seventeen days, working twenty-one hours per day [p. 83], which would amount to 1428 hours. In fact, they only worked 672 hours or considerably less than half that time [pp. 259-260].

The plaintiff Farr testified that he personally put in at least twelve hours a day and sometimes twenty-four hours a day on the job and that either he or plaintiff Sinclair was always on the job. He testified that plaintiff Sinclair devoted the same amount of time to the job as he did [pp. 55, 58].

Plaintiff Sinclair testified to the same effect, stating that he devoted his time to maintenance of the trucks [p. 83].

#### (g) TERMINATION OF EMPLOYMENT.

Defendant's foreman, Burch, testified that on December 9th he had a conversation with either plaintiffs Farr or Sinclair but that he thinks it was with Farr; that he (Burch) told him that the trucks were not in shape and that the defendant couldn't use them in the condition they were in. Plaintiff then said that they were going to work on the trucks and try and get them in shape. The trucks did not work the following day and it was quite a little while before they resumed work [pp. 142-143].

Burch further testified that a day or two later he had another conversation with either Farr or Sinclair in which

they asked him when he was going to let them go back to work and he told them that he didn't know and he didn't think they were going to work any more because they were all done; they then said they had been working on the trucks and had got them back into shape [p. 143]. Burch then testified that a day or so later they again asked him about returning to work and he said he would take it up with Mr. Wells and see if they could go back. He then told them they could go back to work [p. 143].

Defendant's field engineer, Tucker, testified that approximately a week before plaintiffs left the job, plaintiffs stopped him and asked him how much longer they would be on the job, and that he said they wouldn't be on it much longer and he suggested they get in touch with Eaton & Smith, who had just been awarded a contract for work in Richmond. They asked how to get out to see Eaton & Smith and he gave them directions [p. 154]. Tucker testified that on the 18th day of January he told plaintiffs they were through at 3:30 p. m. and that they shrugged their shoulders and said nothing [pp. 155-156]. Tucker testified that about a week later plaintiffs came into the office and wanted to check the hours and amount of money due them from defendant; that defendant had prepared a statement for them and that the plaintiffs went over it with him and he showed them how many hours they had worked, how much was coming, what the documents were and what the net amount to them was. They then wanted to know if they could have this amount but that he said they could not because of the assignment and some outstanding bills that had been presented to the defendant on their account. They then thanked him and left. They never, at any time, said anything about having a contract with the defendant for any specific period of time [p. 156],

nor was anything said about any incorrectness of the accounting furnished by the defendant [p. 157].

Plaintiff Farr was asked if he remembered having a conversation with Burch on the 9th of December in which Burch told him that the trucks were in such terrible condition he couldn't let them work. He answered, "Not that kind of a conversation." He was then asked to state in substance or effect what was said and the answer was, "I don't recall that." He was also asked "If it isn't a fact that at this conversation he (Farr) told him (Burch) that he would do some work on the trucks; that they had been standing around for several years; that everything had dried up, and that he was going to do some work on them," and Burch said something to the effect that, "Well, you better, if you want to work around here," to which the witness answered "No" [pp. 59-60]. He was then asked, "Isn't it a fact that about two days later he told you your trucks were in such bad condition that you were all through on the job," to which he answered, "Mr. Burch didn't say that." He was then asked, "Isn't it a fact that you then asked him if you fixed the trucks and got them back in good shape, could you go back to work?" The witness answered, "All that was with Mr. Wells." He then denied that he had that kind of a conversation with Mr. Wells or with Mr. Burch. He was then asked, "Isn't it a fact that when you asked him (Burch) if you could go back on the job and put the trucks back to work he said he would have to see Mr. Wells about it," to which he answered, "No, sir" [p. 60]. He was then asked, "It was about the end of that first week that Mr. Burch said 'If your trucks are in working condition you can try again,' " to which he answered "No" [p. 60].

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Plaintiff Sinclair denied that he had any conversation with Tucker or anyone else prior to his discharge as to the terms of the agreement with defendant and that January 18th about 2:30 p. m. was the first time that he knew they were through on the job [pp. 84, 93-94]. He denied that he had any conversation with anyone prior to the termination of the employment with regard to Eaton & Smith, but admitted that when he was notified of the termination of the employment, Tucker suggested Eaton & Smith to him [p. 197]. He denied that he had any conversation with Tucker or Burch in which he asked him how much longer they would last on the job [p. 198].

Plaintiff Sinclair admitted that after the termination of plaintiffs' employment he went over the accounts with Tucker who showed him an itemized list of all income and expenses and that he stated to Tucker that the account was substantially correct. He testified that he didn't remember whether any mention was made at that time of any contract between plaintiffs and defendant [p. 196].

#### (h) PROSPECTIVE PROFITS.

Plaintiff Sinclair testified that the profit which they would have made had they continued in the employment of the defendant was 75¢ per truck per hour [pp. 85, 107], arriving at this figure by subtracting from \$2.70 per truck working hour the following figures [pp. 86, 104, 107]:

Insurance (collision, property damage and public liability only).....	\$ .27	per truck per hour		
Parts .....	.42	"	"	"
Mechanics .....	.32	"	"	"
Gasoline and grease .....	.58	"	"	"
Down time .....	.36	"	"	"
<hr/>				
Total.....	\$1.95	"	"	"

He testified that the actual mechanics' salaries and compensation insurance on them for the period of December 9th to January 18th was \$688.69 [pp. 101-102]. The trucks actually worked 672 hours during this time [p. 260]. Mathematically, therefore, the costs of mechanics and their compensation insurance equals slightly over \$1.02 an hour, whereas in the above computation the amount is merely shown as 32¢ an hour. Moreover the computation does not include Social Security taxes [p. 107].

He testified that plaintiff spent \$300.00 for parts, which amounts to almost 45¢ per hour and is exclusive of the balance of \$716.39 which he testified was for permanent improvements [p. 103].

Plaintiffs did not testify as to the individual items in making up the total of collision, property damage and public liability insurance and as these amounts were actually paid by the plaintiffs, the defendant does not know of what they consist. However, inasmuch as the rest of the items in plaintiffs' statement are figures on the basis of each of the trucks working the full twenty-one hours per day, it is safe to assume that this item also is based upon the same supposition. Thus we may assume that the cost of this insurance per truck would have been 27¢ per hour had the trucks operated the full eighty-four hours per day. Inasmuch as they did not do so, the cost of this insurance per operated truck-hour increased in the proportion in which the trucks failed to operate for the full eighty-four hours per day.

He admitted that there was not included in this computation of expenses any allowance for depreciation on either the trucks or the tires [pp. 104-105], "Drivers' time compensation at eleven per cent—8979" [pp. 106-107], or any

allowance for the time of either plaintiff, which he testified was \$1.25 per hour for each of them [pp. 102, 108].

He testified that in arriving at his figures he used the basis of each of the trucks working twenty-one hours per day, except that he allowed for breakdown time at the rate of twelve truck hours per day, whereas actually on the job it was 9% [pp. 109, 111].

Twenty-one hours per day for each of the four trucks for  $17\frac{1}{3}$  days amounts to 1456 hours. Actually the trucks only worked 672 hours during this time [pp. 259-260] or 46% of the total time.

The defendant submitted the computation of the actual costs of operation of the trucks as reflected by the books and records of the defendant as follows [Dft. Ex. A]:

“Cost of Operating Farr & Sinclair Trucks While Working for Macco Construction Co. at Bethlehem Steel Co., San Francisco, December, 1940 & January, 1941.

Income—per hour		2.70
<u>Cost of Operation</u>	<u>Per Hour</u>	<u>Total Cost</u>
Gas—2095 gals. @ .135	.447	282.83
Oil & Grease	.146	91.99
Drivers Comp.	.142	89.76
Non-Operating Drivers time & Insurance	.161	101.30
Mechanic & Ins.	1.062	670.95
Tires	.093	58.99
Parts paid by Macco	.044	27.98
Parts—Inv. direc to Farr & Sinclair, known bills	1.132	716.39
	<hr/>	
	3.227	
Net loss per operated hour		0.527



No allowance in these costs for work performed by either Farr or Sinclair personally, nor for any money expended by them for parts, tires, nor for depreciation of truck or tires.”

This computation, moreover, does not include any allowance for depreciation, except the cost of one tire actually purchased [p. 160], nor does it include the cost of Liability, Property Damage or Collision Insurance inasmuch as plaintiffs procured these coverages and they therefore did not appear upon the defendant's books.

The gross earnings for the trucks from December 9 to January 18 was \$1708.42 [p. 165].

Plaintiffs, however, actually received nothing [pp. 55-84]. The Court will remember this was because of the assignment and because of the unpaid bills presented to the defendant.

#### (i) SUBSEQUENT EARNINGS.

Plaintiff Sinclair testified that following the termination of plaintiffs' work for defendant, he went to several contractors and attempted to find work for the trucks but was unsuccessful mainly because there were no other jobs going on, but subsequently they did find employment earning \$500.00 between January 18th and April 16th [p. 94].

The trucks were subsequently repossessed by Young & Sons who sold them for \$2000.00 [pp. 94-95], leaving a claimed balance due Young & Son of \$1500.00 [pp. 121-122].

IV.

**Specification of Errors.**

The judgment in this case is contrary to the law because:

1. The evidence affirmatively shows that the plaintiffs are not entitled to any recovery in this case because of their failure to secure a permit from the Railroad Commission of the State of California.

2. The evidence fails to support the damages awarded to the plaintiffs.

3. The evidence affirmatively shows that even if the defendant did breach any contract with the plaintiffs, the latter did not lose any profits by reason thereof.

4. The evidence is insufficient to support the implied finding of the jury that the contract between plaintiffs and defendant was for any definite period of time or other than at the will of the defendant.

5. The evidence affirmatively established that if the contract originally was for a definite time, a novation occurred whereby that contract was terminated and a new hiring took place which new hiring was not for a definite period.

6. The evidence fails to support the implied finding of the jury that the defendant breached any existing contract between it and the plaintiffs.

7. The evidence affirmatively shows that the plaintiffs are not the proper parties plaintiff in interest in this action, but that they had assigned their entire right to any recovery herein to Young & Sons.

The Trial Court committed prejudicial error in:

1. Denying the motion of defendant to dismiss.

2. In denying the motion of the defendant under Rule 50B of the Federal Rules for the entry of judgment in its favor.

3. In refusing to enter judgment in its favor.

4. In denying the defendant's motion for a new trial.

The Trial Court committed prejudicial error in refusing to instruct the jury:

1. That before plaintiffs could recover they must show they were ready, able and willing to perform their contract at the time of its alleged breach by the defendant.

2. On the subject of the law of the State of California requiring a permit from the Railroad Commission of that state before property may be hauled by motor vehicles over any highway.

## ARGUMENT.

### V.

#### **The Defendants Are Not Entitled to Recovery Because They Had Obtained No Permit From the Railroad Commission of the State of California.**

The evidence conclusively establishes that whatever contract was entered into between the plaintiffs and defendant, it contemplated the transportation of property over the public streets. Plaintiff Sinclair made a belated effort to avoid this fact. Upon direct and cross-examination plaintiffs related their version of the conversations had with Mr. Wells, but failed to make any reference whatsoever to the question as to where the hauling was to be done. After the defendant made the point that the contract involved transportation over the public streets in violation of the City Carriers Act plaintiff, Sinclair, was recalled to the stand for redirect examination and then testified that Mr. Wells said the hauling job was to be on private property of the Bethlehem Compnay, and that they were going to put the dirt on barges to take to Alameda. The Court will remember that Mr. Wells' testimony was given by deposition, he being in Texas and, therefore, not available to contradict this testimony of plaintiff, Sinclair.

Not only was this testimony of the plaintiff, Sinclair, impeached by his previous testimony with regard to the conversations and subject to the greatest suspicion, because of the time at which it was given, but it is also impeached by the failure of the plaintiffs to call plaintiff, Farr, and question him upon the subject, though he was personally present in Court at the time, and was present at the conversation with Wells. The presumption is

that had plaintiff Farr testified on the subject, his testimony would have been adverse to plaintiffs' contentions. This is particularly true in view of his previous testimony as to his conversations with Mr. Wells. Again, there was no evidence that plaintiffs ever did haul to any barges. In addition, plaintiff Sinclair's testimony in itself is not sufficient to establish that hauling upon private property was a condition of the contract, and any such contention is completely negatived both by plaintiffs' own pleadings and by plaintiffs' conduct.

The attention of the Court is called to paragraph VI of plaintiffs' complaint in which it is expressly alleged that it was necessary for plaintiffs to expend moneys for licenses and permits to enable them to furnish their services and equipment to defendant [p. 4]. If only hauling on private property was contemplated by the contract, then there would have been no requirement for any licenses or permits, not even a motor vehicle license (California Vehicle Code, Sections 81, 250). This Court takes judicial notice of this situation:

*Teplitsky v. Pennsylvania R. Co.*, 38 Fed. Supp. 535.

The attention of the Court is also called to the undisputed fact that the contract between the parties provided for payment at railroad commission rates, which is highly persuasive of the fact that the parties realized that the hauling to be done came within the jurisdiction of that commission, and therefore required a permit therefrom.

As we have said, shortly after the inception of the haulings plaintiffs commenced, without protest, to haul over the public streets and did so continuously thereafter. Their action in so doing amounts to a practical construc-

tion by them of the requirements of the contract, and is the strongest possible evidence as to what were the terms of that contract:

*U. S. Trading v. Newmark G. Co.*, 56 Cal. App. 176, 183-184; 205 Pac. 29;

*Hales v. Browning*, 133 Cal. App. 618; 24 Pac. (2d) 546;

*Preston v. Herming Haus*, 211 Cal. 1, 11-12; 292 Pac. 953.

The *City Carriers Act*, No. 5134, *Deerings' General Laws of the State of California* (Stats. 1935, p. 1057, as amended Stats. 1937, p. 629) makes it unlawful for a carrier to engage in the business of transporting property over public highways without first having obtained a permit so to do, and imposes penalties for its violation.

Thus the Act provides in Section 3 thereof:

"Except as hereinafter provided, no carrier shall engage in the business of transportation of property for compensation by motor vehicle over any public highway in any city in this State without having first obtained from the Railroad Commission a permit authorizing such operation."

Section 13 of the Act provides:

"Any person or any director, officer, agent or employee of a corporation who shall violate any of the provisions of this act or of any operating permit issued hereunder to any carrier, or any order, rule or regulation of said commission, shall be guilty of a misdemeanor and, upon conviction thereof, be fined not more than five hundred dollars or imprisoned in the county jail for not more than three months, or both."

Section 15 of the Act provides:

“Every violation of the provisions of this act or of any order, decision, decree, rule, direction, demand or requirement of the commission, or any part or portion thereof by any corporation or person is a separate and distinct offense, and in case of a continuing violation each day’s continuance thereof shall be and be deemed to be a separate and distinct offense.”

Section 16 of the Act provides:

“In construing and enforcing the provisions of this act relating to penalties, the act, omission or failure of any officer, agent or employee of any person or corporation, acting within the scope of his official duties or employment, shall in every case be and be deemed to be the act, omission or failure of the employing person or corporation.”

The rules of law are well settled in such cases:

1. Where a statute provides a penalty for an act, a contract founded on such act is void although the statute does not pronounce it void or expressly prohibit it:

*City of Los Angeles v. Waterson*, 8 Cal. App. (2d) 331, 346; 48 Pac. (2d) 879;

*Holm v. Bramwell*, 30 Cal. App. (2d) 332, 336; 67 Pac. (2d) 114;

*Citizens, etc. v. Gentry*, 20 Cal. App. (2d) 332, 336; 67 Pac. (2d) 364.

2. If the statute makes the entering into the contract itself unlawful without a license or permit, then the contract is void *ab initio*:

*Houston v. Williams*, 53 Cal. App. 267, 271; 200 Pac. 55;

*Holm v. Bramwell*, 20 Cal. App. (2d) 332, 335; 67 Pac. (2d) 114.

3. If the doing of the act at all is unlawful, then the contract is void *ab initio* even though the parties entered into the contract in perfect good faith:

*Hannah v. Steinman*, 159 Cal. 142; 112 Pac. 1094;

*Dunn v. Stegemann*, 10 Cal. App. 38; 101 Pac. 25.

4. If a license or permit is required by the contracting party and he cannot obtain such license or permit, the contract is void *ab initio*:

*Brashers v. Giannini*, 131 Cal. App. 706; 22 Pac. (2d) 47.

5. If the statute merely makes the act to be done illegal unless a license or permit has been obtained, then the duty of obtaining such license or permit rests upon the person who is to do that act, and until such license or permit has been obtained the contract is inchoate. If the license or permit is not obtained, no actual contract ever comes into existence:

*Smith v. Lunning Co.*, 111 Cal. 308, 310-311, 43 Pac. 967;

*Schroeder v. Wheeler*, 126 Cal. App. 367, 376, 14 Pac. (2d) 903;

*Burke v. San Francisco Breweries Co.*, 21 Cal. App. 198, 202, 131 Pac. 83.

6. If a license or permit is obtained after entering into the contract, then recovery may not be had for acts performed before obtaining such license or permit, though recovery may be had for acts performed thereafter:

*Gardner v. Tatum*, 81 Cal. 370, 373-374, 22 Pac. 880.



7. Even if the one contracting to do the act has a license or permit when the contract is entered into, no recovery can be had if such license or permit had expired or was not in full force and effect when the act actually was done:

*Wise v. Radis*, 74 Cal. App. 765, 242 Pac. 90.

8. A contract which is lawful when made becomes inoperative if thereafter the doing of the act provided for becomes unlawful:

*Industrial Development Co. v. Goldschmidt*, 56 Cal. App. 507, 509, 206 Pac. 134.

9. An illegal contract cannot be ratified even by the acceptance of the benefits thereof:

*Fewel & Davis, Inc. v. Pratt*, 17 Cal. (2d) 85, 91-92, 109 Pac. (2d) 650;

*Davis v. Chipman*, 210 Cal. 609, 634, 292 Pac. 40;

*Duntley v. Kagarise*, 10 Cal. App. (2d) 394, 400, 52 Pac. (2d) 560.

10. The defense of illegality need not be pleaded. As soon as it appears that the doing of the act was or would be unlawful under the particular circumstances existing, such as the absence of a permit, the Court must deny any relief to the plaintiff:

*Tatterson v. Kehrlein*, 88 Cal. App. 34, 263 Pac. 285;

*Payne v. DeVaughn*, 77 Cal. App. 399, 246 Pac. 1069;

*Napa Valley v. Calistoga*, 38 Cal. App. 477, 176 Pac. 699.

11. The denial of relief to plaintiff under such circumstances is not founded upon any consideration for either of the parties to the lawsuit, but is based solely and squarely upon the fact that to permit any recovery by either party would be contrary to public policy:

*Sheble v. Turner*, 46 Cal. App. (2d) 764, 767, 116 Pac. (2d) 630;

*Woods v. Kern County*, 34 Cal. App. (2d) 468, 473, 93 Pac. (2d) 837;

*Del Rey Realty Co. v. Fowl*, 44 Cal. App. (2d) 399-402, 112 Pac. (2d) 649;

*Fewel & Davis, Inc. v. Pratt*, 17 Cal. (2d) 85, 91-92, 109 Pac. (2d) 650;

*Duntley v. Kagarise*, 10 Cal. App. (2d) 394, 400, 52 Pac. (2d) 560;

*Davis v. Chipman*, 210 Cal. 609, 624, 293 Pac. 40.

Since the evidence discloses without any conflict whatsoever that the plaintiffs did haul over the public streets, but that at no time did they hold a license or permit as required by the City Carriers Act, there can be no question, under the above authorities, but that any recovery upon their part should have been denied.

The defendants certainly understood that the hauling to be done by the plaintiffs did include hauling over public streets. In fact, after a very short period of time following the inception of the work, *all* of the hauling done and required of plaintiffs was over the public streets, and this hauling over such public streets constituted by far the greatest portion of the consideration to defendant for entering into the contract. If the plaintiffs did not understand the contract as contemplating such hauling over the

public streets, then the minds of the parties never met upon the terms of that supposed contract, and no actual contract between them ever came into existence.

Thus it is said in *American Can Co. v. Agricultural Co.*, 12 Cal. App. 133, 137, 106 Pac. 720:

“A contract is an agreement to do, or not to do a particular thing. It must be by consent, which is free, mutual and communicated by each to the other. The consent is not mutual unless the parties all agree upon the same thing in the same sense, and unless they do so agree there is no contract.”

For examples of cases in which it has been held that there had been no meeting of minds are:

*Barfield v. Price* 40 Cal. 535 (prior to Pacific Reporter);

*Rovengno v. Defferari*, 40 Cal. 459, 462-463 (prior to Pacific Reporter);

*Muer v. Hogue*, 91 Cal. 442, 448, 27 Pac. 744;

*Harvey v. Duffey*, 99 Cal. 401, 405, 33 Pac. 897;

*German Savings Bank v. McLellan*, 154 Cal. 710, 716, 99 Pac. 114.

However, even if contrary to the evidence in the case, it could be said that the parties knowingly entered into a contract for a definite period and for hauling over private property, nevertheless the evidence shows that subsequently either a novation took place or the contract was modified to require hauling over the public streets.

In California a novation of a contract may occur between the original parties and without the substitution and

addition of any new party. Thus it is provided in *Civil Code, Section 1530*:

“*Novation, what.* Novation is the substitution of a new obligation for an existing one.”

And in *Civil Code, Section 1531, Subdivision 1*:

“*Modes of novation.* Novation is made:

“1. By the substitution of a new obligation between the same parties, with intent to extinguish the old obligation; \* \* \*”

However, whether or not technically a “novation” occurred is immaterial since a modification of the contract has, under our California authorities, the same effect.

The following wording is used by the Court in the case of *Anderson v. Standard Lumber*, 64 Cal. App. 410, 416, 221 Pac. 686:

“Even if the contract had been binding on defendant, nevertheless, when plaintiff, on his arrival, stated that he could not do the work for which he had been employed and agreed to do other work at a smaller salary, he thereby abandoned the first contract. It is not a question of the oral modification of a written contract, but an abandonment thereof and the substitution of the oral contract in its stead.”

To the same effect see:

*Sprague C. & M. Co. v. Western R. Corp.*, 29 Cal. App. 374, 155 Pac. 1017;

*Murphy v. White*, 101 Cal. App. 719, 282 Pac. 427;

*DeLong v. Machine Marble Works*, 95 Cal. App. 741, 273 Pac. 107;

*Hubbard v. Jurian*, 35 Cal. App. 757, 170 Pac. 1093;

*Barrett-Hix Co. v. Glas*, 9 Cal. App. 471, 99 Pac. 856.

Remembering that the very trucks which formed the subject of the original contract between the parties were actually used by plaintiffs to haul over the public streets, plaintiffs cannot contend that at the very time of such hauling these same trucks should have been used solely on private property. *Proud v. Strain*, 11 Cal. App. 74, 77, 103 Pac. 949, 950, involved a contract for the sale of cabbage, which contract was subsequently modified. It was held that the plaintiff while acting under the modified contract could not claim that the original contract was still in force, the Court saying:

“The new oral obligation created by the absolute sale of the cabbage to the defendant abrogated the commission contract, and evidence of the creation of the new contract is evidence of the waiver of all rights under the commission contract by defendant. He could not while making an absolute purchase of the cabbage say that the old contract was still in force as to the very cabbage which he was buying.”

A novation or modification of a contract may be established just as well by conduct as by express oral or written agreement. Thus it is said in *Producers Fruit v. Goddard*, 75 Cal. App. 737, 755, 243 Pac. 686, 693:

“Hence, upon the making of an oral agreement, the written contract of March 1, 1917, *ipso facto et eo instanti*, passed out of existence and became *functus officio*. And this proposition would still remain unimpeachable even where the statute of frauds had been successfully interposed against the enforcement of the terms of the new agreement itself. The question whether a novation has taken place is always one of intention (citing authorities), and where it satisfactorily appears that a new agreement was in-

tended by the parties to take the place of an existing one, as clearly it was so made to appear here, since the parties proceeded to be and were for two years governed by the substituted agreement, then, as stated, it necessarily follows that the old agreement has been entirely abrogated or extinguished. (Citing authorities.)”

In the present case it is clearly made to appear that the parties from shortly after the inception of the work proceeded to be and were governed by the substituted agreement, namely, the agreement to haul over the public streets, and that any previous agreement had therefore been entirely abrogated and extinguished.

Again it is said in *Dunham-Corrigan-Hayden Co. v. Rubber Co.*, 84 Cal. App. 669, 673, 258 Pac. 663, 664:

“The making of an agreement may be inferred by proof of conduct as well as by proof of the use of words. (Citing authorities.)”

Again it is said in *Silva v. Providence Hospital*, 14 Cal. (2d) 762, 773, 97 Pac. (2d) 798, 804:

“For example, conduct may form a basis for novation, though there is no express writing or agreement (citing authorities).”

In view of the above well established principles of law as announced by the courts of the State of California, and of the undisputed facts with regard to the hauling over the public highways of the City and County of San Francisco, plaintiffs are not and cannot be entitled to any recovery in this case and the judgment in their favor must be reversed.

VI.

**Error in Refusing Instruction on Requirement for a Permit.**

The defendant requested the Court to instruct the jury as follows [pp. 222-223]:

You are instructed that the laws of the State of California in force and effect at the time of the transactions involved herein provided that no carrier should engage in the business of transportation of property for compensation by motor vehicle or truck over any public highway, road or street in any city in this State, without having first obtained from the Railroad Commission of the State of California, permit authorizing such operation. By the term "carrier" is meant any person or persons engaged in the transportation of property for compensation or hire by means of a motor vehicle or truck as a business on any public highway, road or street in any city or county in the State of California.

You are therefore instructed that if you find that the plaintiffs, in entering into or performing the contract alleged in this case, engaged in the business of transportation of property for compensation by motor trucks over any such highway, road or street, but that they did not have such permit from the said Railroad Commission, during the time involved in this litigation, then said alleged contract was illegal and void, and plaintiffs cannot recover in this action and your verdict herein must be for the defendants.

The Court refused to give this instruction and we are certainly at a loss to understand its reasons for so doing.

The evidence was clear and uncontradicted that the defendants did haul property over the public highways of the State of California, and it was stipulated that they did not have a permit so to do from the Railroad Commission of that State. The Court gave no instruction whatsoever with regard to the law requiring such a permit or penalties for failing so to have, and without the requested instruction, or a similar one, the entire evidence in the case with regard to where the hauling was done and the absence of the permit must have been completely meaningless to the jury.

Under the authorities cited in the preceding subdivision of this brief, there can be no doubt that the failure of the Court to give the instruction constitutes reversible error.

## VII.

### **The Amount of Damage Awarded to Plaintiffs Are Excessive Even According to Plaintiffs' Own Claims.**

Plaintiffs predicate their claim of loss on the premise that each truck made a profit of 75¢ an hour and contend that if they had been allowed to operate them to the completion of the work they would have made certain profits. The evidence shows that up to the 18th day of January, 1941, there were 17-1/3 job days computed on the basis of 21 hours per day; that the total number of job days from the beginning to the final completion of the work was equivalent to approximately 55-1/6 days, plus the equivalent of 3 days of cleanup work after the big shovels



had moved out. Of this total time plaintiffs had worked 17-1/3 days, and subtracting this from 55-1/6 days of 21 hours each, or a total of just under 798 hours of actual work after the termination of plaintiffs' contract. Even taking plaintiffs' own figures of 75¢ per operated hour of profit per truck, or \$3.00 per hour for the four trucks, and applying that to the total remaining time of the work, that is assuming for that purpose that the trucks worked every minute of the remaining time, this profit would only come to the sum of \$2394.00 for all four trucks. Subtracting from this sum the amount of \$500.00 which plaintiffs admittedly made during the remainder of the period, leaves an absolute maximum of \$1894.00, beyond which under no possible circumstances can recovery be justified.

### VIII.

**The Evidence Affirmatively Shows That Even If Plaintiffs' Employment Had Not Been Terminated They Would Have Made No Profit.**

We have just considered the figures presented by the plaintiffs themselves. They are, however, obviously incorrect and not supported by the evidence. Thus, it is uncontradicted that during the time that the plaintiffs were hauling on the job, their trucks only worked 47% of the total job time and of course plaintiffs were only to be paid for the time that their trucks actually worked. Still using the figure of 75¢ an hour, 47% of the remaining hours worked would have resulted in a *gross* profit of \$1125.18, which, again allowing the credit of \$500.00 otherwise earned by plaintiff, leaves a balance of \$625.18.

The plaintiffs in arriving at the sum of 75¢ an hour profit in many instances used arbitrary figures. Their computation was:

Mechanic's time	.32 an hour
Public Liability, Property Damage and Collision Insurance	.27 " "
Parts	.42 " "
Gas and Oil	.58 " "
Down time	.36 " "
<hr/>	
Total	\$1.95

This computation made by plaintiffs themselves does not include Compensation Insurance on the drivers, which admittedly amounted to 14.2¢ per hour [Defts. Ex. "A," p. 224; Sinclair, p. 106], or Compensation Insurance on the mechanics amounting to 3.52¢ per hour (using same basis for computation), or social security and unemployment insurance, the employer's share of which, under the law, amounted to 3.7% of wages paid, or 5.25¢ per hour on the driver and 1.18¢ per hour on the mechanics. These make an additional fixed expense of 24¢ per hour and increase plaintiffs' figure from \$1.95 to \$2.19 per hour.

The above, however, is still exclusive of depreciation on trucks and tires for which a very reasonable allowance would be 20¢ per hour, increasing plaintiffs' hourly expense to \$2.39 and reducing plaintiffs' profit, by taking into consideration the above known factors, to 31¢ per hour, still exclusive of plaintiffs' own time which they figured at \$1.25 per hour for the full twenty-one hours a day, license fees and other sundry expenses.

The Court will note that in the above computation made by plaintiffs, mechanics' time is listed at 32¢ per hour.

Plaintiff Sinclair testified that the mechanics were paid \$9.00 per shift and that there were three shifts per day, making a total payment to mechanics of \$27.00 a day [p. 111]. Had the trucks worked the full 84 hours per day, the cost of these mechanics would, therefore, be the exact figure set forth in plaintiffs' computation, namely, 32¢ an hour, but as we have previously pointed out, the trucks did not in fact work the full 84 hours a day working only 47% of that time. Since the mechanics were necessarily employed for the full time irrespective of the actual operation of the trucks, their cost per operated truck hour would necessarily increase from 32¢ per hour to 68¢ per hour.

The same also applies to Compensation Insurance, Social Security and Unemployment Insurance on the mechanics and to the items of Public Liability, Property Damage, Collision Insurance and to Parts.

Change plaintiffs' computation to include these indisputable items and the revised computation is as follows:

Mechanics' Time .....	\$ .68	an hour	
Mechanics' Compensation Insurance .....	.0725	"	"
Mechanics' Social Security.....	.0243	"	"
Public Liability, Property Damage and Collision Insurance....	.57	"	"
Parts .....	.89	"	"
Gas and Oil.....	.58	"	"
Down Time .....	.36	"	"
Drivers' Compensation Insurance .....	.14	"	"
Drivers' Social Security.....	.0525	"	"
<hr/>			
Total.....	\$3.369		

Plaintiffs' costs of operation was, therefore, greater than their gross revenue of \$2.70 an hour, and this is so without considering depreciation on trucks or tires, plaintiffs' own time, license fees, etc.

That this computation is not purely theoretical is shown by computation based upon actual experience with these very trucks on this particular job. Defendant's Exhibit "A" represents only actual amounts definitely appearing on defendant's records and is as follows:

"Cost of Operating Farr & Sinclair Trucks While  
Working for Macco Construction Co. at Bethlehem Steel Co., San Francisco, December, 1940  
& January, 1941.

Income—per hour		2.70
Cost of Operation	Per Hour	Total Cost
Gas—2095 gals. @ .135	.447	282.83
Oil & Grease	.146	81.99
Drivers Comp.	.142	89.76
Non-Operating Drivers time & insurance	.161	101.30
Mechanic & Ins.	1.062	670.95
Tires	.093	58.99
Parts paid by Macco	.044	27.98
Parts—Inv. direct to Farr & Sinclair, known bills	1.132	716.39
	<hr/>	
	3.227	
Net loss per operated hour		0.527

No allowance in these costs for work performed by either Farr or Sinclair personally, nor for any money expended by them for parts, tires, nor for depreciation of truck or tires."

It will be noted that this shows an operating cost of \$3.227 per hour, or a net loss of \$0.527 per hour. As this computation was made solely on the basis of actual expenditures known to the defendant, it is by no means all inclusive, thus it did not take into consideration the liability, property damage and collision insurance carried by plaintiffs, and only took into consideration the cost of one tire that was purchased during this time by defendant for plaintiffs.

Therefore, without taking into consideration the cost of public liability, property damage and collision insurance and other bills which may have been incurred, of which the defendant has no knowledge, it is undisputed in the evidence that the operations conducted by plaintiffs up to January 18th were such that the known bills and expenses exceeded the amount earned by approximately \$500.00.

Certainly the above facts and figures furnish no basis whatsoever for the allowance of future prospective profits to be derived from the operation of the old and defective trucks being used by plaintiffs, and certainly does not support any award to plaintiffs of such prospective profits.

We submit that it is perfectly obvious that in awarding plaintiffs \$2500.00 in damages, the jury were merely endeavoring to provide a fund approximating the total outstanding bills against the plaintiffs and out of which plaintiffs' creditors could be paid. In this connection the attention of the Court is called to the remarkable question asked by the jury during their deliberations, which question was as follows, namely [p. 220]:

“Can Young & Sons secure a deficiency judgment for \$1500.00 on any sum allowed the plaintiff?”

We submit that even if the plaintiffs had established in this case that the defendant breached its contract with them and that the contract was one upon which they could recover, the evidence in this case clearly shows that, having suffered no loss of profits thereby, they were not entitled to any award of damages.

## IX.

### **The Contract Was Not for Any Definite Period of Time.**

According to both plaintiffs, they had a preliminary conversation with Mr. Wells with reference to obtaining employment with the defendant. They testified that at this conversation they asked how long the job would last and Wells said four months. Plaintiff Farr, however, testified that Wells not only said that the job would last four months but also that it would last 120 working days. The extreme improbability of his having made any such statement is shown by the fact that the defendant was required by its contract to complete the job in approximately four calendar months during the rainy season and including Sundays and holidays. Obviously there would not be 120 working days. Again the undisputed evidence shows that in fact there were only 55-1/3 working days. It is inconceivable that Wells could be so far out in his estimate of the working time required on the job or that plaintiffs would not have known that any such estimate was far too high.

Plaintiff Sinclair positively testified that Wells not only assured them that their trucks would work the whole four months but also that when the job was over plaintiffs could follow the defendant around as it did many jobs

all over the coast. If Wells made this statement and it was the basis for the subsequent agreement, then plaintiffs were not employed for the particular job as alleged in their complaint and claimed by them, but were employed permanently from then on. Plaintiffs cannot arbitrarily take one portion of a statement and use it as the basis of a contract and at the same time ignore another portion of that same statement.

It is perfectly obvious that if Wells ever made any such statement, which Wells emphatically denied, he merely did so as an expression of his opinion that there would be sufficient work for plaintiffs so that their services would continue to be needed not only on the particular job but on subsequent jobs. It is equally obvious that plaintiffs so understood such statements, if made, and in fact so understand them at the present time since they make no claim to have been permanently employed by the defendant.

Again if the statement was actually made by Wells and did form a part of the later contract, since the whole of that statement must be considered, it would be a contract for employment extending over more than a year and, not being in writing, would be unenforceable under the Statute of Frauds.

That plaintiffs account of this conversation is not reliable is clearly shown by the fact that plaintiff Farr testified that they asked Wells how long the job would last and he said four months or 120 working days, but that *nothing else was said in reference to plaintiffs' employment* except that Wells said the equipment sounded interesting and that plaintiffs would be welcome to go to work for defendant on another job after the Bethlehem Steel job was over. It will be noted that Farr not only did not testify that

Wells "assured" them that the trucks would work the whole four months, but in fact his testimony definitely negatived any such statement having been made by Wells.

It is inconceivable that if it were to be an actual term contract, that plaintiffs were to be employed for the entire four months, Farr would have so completely forgotten it as to positively testify that nothing was said with reference thereto. Farr's testimony on the point clearly shows that either Sinclair was mistaken in his testimony that Wells made any statement as to the length of their employment, or else that, if such statements were made they were not considered by the plaintiffs as of any particular importance, or as anything more than Wells' opinion as to the amount of work to be done on the job.

That Sinclair could be mistaken in his testimony is demonstrated beyond doubt by the fact that at one place he testified that in this conversation Wells said that the defendant's trucks were going to be in San Diego and that was why he was glad to get plaintiffs' trucks and asked them if they knew any one else who had any trucks, while at another place he testified that at this conversation Wells stated that he would *probably* be interested in renting plaintiffs' trucks as soon as he learned whether or not the defendant's trucks were going to San Diego. Obviously Sinclair was mistaken as to Wells having made one or the other of these statements.

However, both plaintiffs admit that no contract was entered into at this conversation, and that in fact they saw



Wells twice more before he finally told them that they were hired.

The subsequent conduct of the parties again clearly demonstrates that the hiring was not for any definite period, nor for the length of the job. Thus, when the defendant was asked to sign a guarantee of payment to Young & Sons, it positively refused to do so and was only willing to accept an assignment made to Young & Sons upon the distinct understanding and agreement that it was only obligated to make payment out of moneys to become due and payable from them to plaintiffs and not otherwise, and that it would not guarantee that any payments in fact would become due to plaintiffs.

Again when the defendant terminated the contract the plaintiffs admit that they made no protest whatsoever. Not only did they make no protest but they came in and went over their accounts with the defendant and specifically OK'd these accounts and asked for payment of the balance shown to be due them. They admit that even then they made no protest on account of the termination of their employment and made no claim that they should have been permitted to continue working for the defendant.

We submit that the evidence entirely fails to support the implied finding of the jury that the plaintiffs were hired for any definite period of time or other than at the will of the defendant.

X.

**Novation.**

Even if the original contract had been for the length of the job, the evidence clearly shows that a novation occurred.

As we have previously shown, if the contract originally was merely for the hauling of property on private property a novation must have taken place since in fact practically all of the hauling was done over the public highways.

Admittedly when the trucks reported for work on December 9th they were not in a condition to do the work and were laid off for some time. Defendant's Foreman Burch, testified that on December 9th he had a conversation with either plaintiffs Farr or Sinclair, but he thought it was Farr, in which he (Burch) told the plaintiff that the trucks were not in shape and that the defendant couldn't use them in the condition they were in. While plaintiff Sinclair denied any such conversation, all the plaintiff Farr testified in connection therewith was, "I don't recall that." Burch testified that the plaintiffs then said that they were going to work on the trucks and would try to get them in shape. Again Sinclair denied any such conversation, but all Farr denied was that he had a conversation in which he told Burch that the trucks had been standing around for several years and that everything had dried up, and that he was going to do some work on them. This is not a denial of the conver-

sation as related by Burch. Burch further testified that a day or two later he had another conversation with one of the plaintiffs in which he was asked when he was going to let them go back to work, and that he told them he didn't know and he didn't think they were going to work any more for the defendant because they were all done. Farr does not deny this conversation.

Reconciling the testimony of the three witnesses as we should do where it is possible, it appears that Burch did tell Farr that the trucks were not in shape and that the defendant couldn't use them in the condition they were in; that Farr said he was going to work on the trucks and try and get them in shape; that a day or two later he asked Burch when he was going to let the plaintiffs go back to work; that Burch told them that he didn't know and he didn't think they were going to work any more because they were all done; and that thereafter Farr asked to be allowed to come back on the job and Wells told him he might try again.

It is quite apparent from the foregoing that even if the original contract had been for a definite period of time, it was terminated by mutual consent when, at the start of the job, plaintiffs' trucks were not in a condition to work, and that thereafter a new employment took place, this new employment being entirely tentative and depending upon the then condition of the trucks and without any provision as to the length of such employment.

XI.

**Even Had There Been a Contract for a Definite Time,  
the Defendant Was Justified in Terminating It.**

While there was a conflict in the evidence as to the condition of the trucks, nevertheless the plaintiffs themselves, by their own admissions showed that the trucks were old, second-hand trucks not in good condition and not suitable for the work for which they were employed.

However, one salient fact stands out in this connection, and of itself conclusively proves the unserviceability of the plaintiffs' trucks despite any evidence to the contrary given by the plaintiffs and their witness Thiel. During the period plaintiffs' trucks were on the job they only worked 47% of the time, yet according to the plaintiffs themselves, the defendant was badly in need of trucking service and even had asked them if they knew where it could obtain additional trucks. It is uncontradicted in the evidence that the failure of the plaintiffs' trucks to be able to operate delayed all the operations of the defendant who, it will be remembered, was under contract to complete the job by a specified date.

Under these circumstances we submit that the defendant, no matter what were the terms of the original contract as to its duration, was not only entirely justified, but in self protection was obligated to terminate plaintiffs' employment and thus be able to proceed with its work without the delays caused it by the constant breaking down of plaintiffs' equipment.

XII.

**The Court Erred in Refusing to Instruct the Jury Before Plaintiffs Could Recover They Must Show That They Were Ready, Able and Willing to Perform the Contract.**

The very least that can be said from the evidence is, that the jury might have found that plaintiffs' equipment was in such bad condition that they were not either ready or able to perform their contract with the defendant. If the jury had so found, then under the most elementary principles of law they were not entitled to recover from the defendant even if the latter breached the contract.

The defendant was undoubtedly entitled to have the jury instructed under the evidence of this case upon this principle of law. Under the instructions to the jury as given by the Court, the plaintiffs would have been entitled to recover if they established that the contract was for the entire period of the job irrespective of the condition of their equipment and irrespective of their ability to do the hauling required under that contract.

In view of the not only persuasive but conclusive evidence that plaintiffs' equipment was not capable of doing the work required by the contract, the failure of the Court to instruct the jury that this fact would bar the plaintiffs from recovery cannot be considered as other than highly prejudicial to the defendant. The error of the trial court in refusing to give this instruction itself requires a reversal of the judgment.

XIII.

**Effect of Assignment to Young & Co. Ltd.**

As we have previously shown in this brief, even under their own figures, the maximum which the plaintiffs could have recovered was less than \$2000.00. Actually they were awarded \$2500.00. Both of these sums are less than the amount of the submitted assignment to Young & Co. Ltd., intervenor in this case. The action should therefore have been instituted by Young & Co. Ltd.

XIV.

**Conclusion.**

We submit that the judgment in this case must be reversed because of the failure of the evidence to establish that any contract for any definite period was ever entered into between the parties; because of the excessiveness of the judgment; because of the errors of the trial court in refusing to give the two instructions set forth in this brief; and because the plaintiffs were not the real parties in interest.

We further submit that because on a new trial no different showing could possibly be made, the judgment of the trial court should not only be reversed, but should be reversed with instructions to enter a judgment in favor of the defendant as the evidence affirmatively shows that plaintiffs failed to obtain a permit from the Railroad Commission of the State of California and because it establishes that they suffered no damages whatsoever by reason of the termination of their employment.

Respectfully submitted,

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No. 10,312

IN THE  
**United States Circuit Court of Appeals**  
For the Ninth Circuit

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MACCO CONSTRUCTION COMPANY  
(a corporation),

*Appellant,*

VS.

A. L. FARR, R. P. SINCLAIR and YOUNG  
& SON Co., LTD. (a corporation),

*Appellees.*

**BRIEF FOR APPELLEES.**

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FILED

FEB - 8 1943

PAUL P. O'BRIEN,





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& SON Co., LTD. (a corporation),

*Appellees.*

## BRIEF FOR APPELLEES.

---

### STATEMENT OF PLEADINGS.

Defendants appeal from a jury verdict awarding appellee damages for the wrongful breach of a contract for the furnishing of auto trucks and personal services. The complaint alleges (paragraph III):

“That on or about the 3rd day of December, 1940, defendants and plaintiffs entered into an oral agreement \* \* \* wherein \* \* \* plaintiffs agreed to furnish four automobile trucks and the personal services of plaintiffs \* \* \* and defendant agreed to hire the exclusive personal services of plaintiffs and said truck equipment for the entire duration of that certain grading and excavating project situated in the City and County of San Francisco; that relying upon said oral

agreement and pursuant thereto plaintiffs did purchase said number of automobile trucks and defendants did hire the personal services of plaintiffs and the use of said equipment for a period commencing on the 3rd day of December, 1940.

“That on or about the 18th day of January, 1941, defendants without cause discharged plaintiffs \* \* \*

“That under and pursuant to said \* \* \* agreement defendants agreed to pay plaintiffs \* \* \* for compensation \* \* \* and the use of said equipment the sum of \$2.70 per hour per truck, and in addition thereto the sum of \$1.43 per hour per truck on account of the payment of the salary, insurance, etc., of the driver of each truck \* \* \* and that the period contracted for as aforesaid was and is approximately four months \* \* \* that by reason of said breach \* \* \* plaintiffs have been damaged in the total sum of \$6400.00.”

The answer of defendants (Paragraph III) alleges:

“Admit defendant Macco Construction Co. and plaintiffs entered into an oral agreement \* \* \* wherein and whereby the plaintiffs agreed to furnish four automobile trucks and the personal services of plaintiffs \* \* \* but deny that said agreement \* \* \* was for the entire duration of that certain \* \* \* project \* \* \* and alleges that plaintiffs would furnish and maintain said automobile trucks in good, safe, serviceable and workable condition \* \* \* for such time as this answering defendant should desire to avail itself thereof in connection with said grading and excavating project and for no other or longer purpose or period of time.”

Paragraph V of the answer admits:

“That under and pursuant to the agreement defendant agreed to pay plaintiffs \$2.70 per hour per truck \* \* \* and in addition thereto the sum of \$1.43 per hour on account of payment of salary of drivers.”

Then follows a denial of the remaining allegations plus the additional defense of Paragraph II of the second cause of action:

“that the automobile trucks and each of them furnished by the plaintiffs to this defendant were not in good or serviceable or workable condition and that the plaintiffs did not maintain said trucks in good, safe, serviceable or workable condition \* \* \*.”

It is to be noted that in no place in the answer or in the affirmative defense is it alleged the contract entered into between the parties was contrary to law. Therefore, the only issues presented were:

- (1) the duration of the contract,
- (2) the cause of the termination of the contract, and
- (3) the damages suffered, if any.

After a trial by jury a verdict was returned in favor of the plaintiffs in the sum of \$2500.00.

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#### 1. DURATION OF THE CONTRACT.

Appellant contends the contract was at will. The appellees contend it was for a specified time, to wit,

for the duration of the job, or approximately four months. Eliminating the oral testimony and concerning ourselves solely with the documentary evidence, we are immediately confronted with a writing to the effect that at the inception of the contract in December, 1940, it was contemplated that the appellees would at least have some income for a period of four months. (See Assignment, "Exhibit A", Tr. p. 234.) Upon this assurance appellees purchased trucks for the job.

The testimony of Farr and Sinclair, and of attorney O'Neill (Tr. pp. 50-64, 71-90), demonstrates that when the contract was being considered conversations and negotiations were exchanged to the ultimate end that for a period of four months Farr and Sinclair would be earning a sufficient sum of money out of which they could pay the sum of \$875 per month, commencing with January 4, 1941, and every month thereafter until the total amount of \$3500 was paid for the trucks. Upon this representation the assignment (Exhibit A) was made and accepted, and provided, among other things, that out of the *first moneys to become due and payable* (to appellees) from the Macco Construction Co. under (appellees') contract, \$875 per month would be paid to Young & Son. This assignment was accepted by the Macco Construction Co. through its general superintendent, Ben Wells. Now, in this assignment it should be noted the word "*contract*" is used. Certainly *contract* means just one thing and that is a job for a certain period of time. And it must have been contemplated that period of



time would be four months, the duration of the job. Otherwise, why would Wells lead the sellers of the trucking equipment which was purchased by the appellees for the job, to believe that for a period of four months plaintiffs would have work? It is not conceivable that the general superintendent of the Macco Construction Co. would permit the sellers of the trucking equipment to rely upon the statement that Farr and Sinclair would make payments for a period of four months unless at that time Wells represented the job would last for that period. This document corroborates the oral testimony of Farr and Sinclair in this regard. The contract under which Macco performed the work provided the work was to be completed on or about April 1. (See testimony of District Engineer McLean, Tr. p. 32.) This contract was made between Macco Construction Co. and the Bethlehem Steel Co. The contract was entered into in November and the period for completion was April. This evidence, coupled with the testimony of Farr and Sinclair, the witness O'Neill's testimony, and the written assignment, demonstrates most forcibly that the question of the duration of the contract was decided in accordance with the evidence. The great weight of the testimony is in favor of the conclusion reached by the jury, and this factual question being resolved in favor of the plaintiffs, the reviewing tribunal will not disturb it where sufficient and abundant evidence appears.

Appellant contends there was no meeting of minds as to the duration of the contract. The jury found

otherwise. It is significant that for over a period of seventeen days plaintiffs worked in excess of 669 hours under extremely adverse conditions doing the work which was directed to be done by the appellant and being credited with the amount of such work, being furnished drivers by the appellant who used the appellees' equipment and who were paid on the basis of an agreed contract price, plus social security deductions and compensation deductions; appellant secured drivers from the local union to operate the trucks of the appellees (page 82); daily records were kept by the appellant of the work the drivers and appellees performed; work sheets were kept and filed under the supervision of appellant; after each load these work sheets were turned into the appellant for its records in charging the U. S. Navy or the Bethlehem Steel Co. on the basis of the dirt removed; the appellant took advantage of the benefits of the appellees' work and yet contend that there was no meeting of minds and that there was no contract. This was a factual question, and the jury, in deliberating upon these issues, considered all the contentions appellant advances here, the circumstances surrounding the entering into of the contract, the execution thereof, the work performed and the recognition given to this contract, and found as a fact that there was a meeting of minds, that the appellees were ready, willing and able to perform and that the contract was terminated without just cause by the appellant. The reviewing Court will not disturb a factual finding unless the great weight of the evidence is against such finding or the verdict is contrary to law.

## 2. THE CAUSE OF THE TERMINATION OF THE CONTRACT.

The evidence demonstrates the trucks were brought over to the Bethlehem property in December, 1940. The appellant's witness testified that dumping was to be done on the private property of the Bethlehem Steel Co. This element is only important to illustrate that the trucks were rented to the appellant. The appellant was the one who hired the drivers and directed them where to dump the haul. The question presented by the appellant is the following: First, while it admits a contract was entered into it contends that it was terminated (a) because the contract was illegal, and (b) because the equipment furnished was not in good and workmanlike order.

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### (a) LEGALITY OF THE CONTRACT.

This defense was not pleaded. Therefore it is not available to appellant now.

*Jefferson v. Burhans*, 85 Fed. 949.

The original contract being legal, the defense of illegality could not be raised on an isolated question asked during cross-examination of one witness, during the trial. In the pretrial conferences, and all the discussions with the trial judge, when the issues were limited, no mention was made of this additional defense. It was only after the appellees had rested their case in chief that an instruction was offered on this phase of the case.

The appellee contends the question as to the legality of the contract was not properly pleaded. It was

raised at a late period in the trial and therefore the appellant cannot for the first time take advantage of it. However, appellee will comment upon it in reply to appellant's brief.

The evidence discloses that all drivers were furnished through the appellant and that the appellant had control of the drivers. They were directed by the appellant as to where to go and appellant did direct the drivers to the private property of the Bethlehem Steel Co. It was only after working for some time, and after unusual and severe weather, and due to the muddy condition of the roads and property, that the drivers were directed to go outside of the property of the Bethlehem Steel Co. This circumstance prompted the appellant to invoke the defense that because there was no permit issued by the State of California under City Carriers Act to appellees the contract was void. We do not subscribe to this reasoning. The need of a permit is too remote from the cause of the breach.

Appellant has cited numerous and voluminous authorities to support its position. It contends these authorities hold the contract is void and therefore rights under it are unenforceable. In this premise they are mistaken. The cases cited are not applicable. The contract calls for the services of the two plaintiffs and for the furnishing by them of automobile trucks. This they did. City Carriers Act, 5134 Deering's General Laws, State of California, is a revenue raising measure and there is nothing in that act which prohibits the furnishing of personal services or of automobile trucks to the appellant to be operated by its

drivers and under its instructions and under the direction of its drivers. There is nothing in the contract contrary to public policy or law. Let us review appellant's cases.

*U. S. Trading v. Newmark G. Co.*, 56 Cal. App. 176, was a suit for damages for the breach of a contract for the delivery of barley. During the period of time contemplated for the delivery of the barley, the United States Government placed an embargo on all grain and placed the burden upon the shipper to secure a permit for the shipping of such grain. In upholding a judgment in favor of the plaintiff, the Court held that in view of the past relationship between the plaintiff and the defendant it was the duty of the defendant to secure the permit and the burden was on the defendant to procure all necessary cars in which the grain was to be shipped, bills of lading, etc., inasmuch as the terms of the contract so provided. At most, the contract was not void; its operation was merely suspended. The contract was enforceable.

The next case cited is *Bayles v. Browning*, 133 Cal. App. 618. This was a landlord and tenant case and centers around the admissibility of evidence, the Court holding that evidence of conversations had prior to the time a written contract was entered into was admissible for the purpose of showing the intention of the parties. It has no bearing at all upon the legality of any contract.

The next case cited is *Preston v. Herminghaus*, 211 Cal. 1. Your Honor probably recalls this case which involved John W. Preston, formerly a Supreme Court

judge in the State of California. It involved an attorney and client and the construction of a contract for a contingent fee. A judgment was recovered by Judge Preston, the Court holding that ambiguities are most strongly construed against persons causing them.

How appellant can say that the foregoing authorities support its contention that the contract between Farr and Sinclair and Macco Construction Co. was void is beyond our interpretation of these cases.

Appellant contends that where a statute provides a penalty for an action, a contract founded on such action is void although the statute does not pronounce it void or expressly prohibit it. In this respect the appellant confuses legislation which is passed for the purpose of *revenue* and that which is passed for the purpose of *qualifying* an individual to do or not to do a certain act. In the first class of cases are licensing automobiles, or permitting persons to drive an automobile, or taxing businesses. The cases all hold this type of license is revenue raising and enforceable. (See cases *supra*.)

To the same extent one might consider the unlawfulness of driving an automobile at 45 miles per hour. Could it be said that although driving an automobile at this speed is against the law, a passenger would not have to pay for the fare because of a violation of the speed limit? (See *Zierner v. Babcock & Wilcox*, 22 Fed. Supp. 384.)

The second class of cases deals with the qualifications and ability of persons to perform certain acts. In this class come licenses granted to doctors, law-

yers, dentists, master mechanics, etc. In this regard appellant cites the case of *City of Los Angeles v. Waterson*, 8 Cal. App. (2d) 331. This case is not important. This was an action to compel bondholders who had fraudulently received bonds of an irrigation district to pay for such bonds or to return them to the irrigation district. There is also a question of whether or not the officer selling the bonds was or was not interested in the sale, and the Court held that for equity to deny plaintiff relief in such an action the contract must have so infected the litigation as to be a part of it, and further held that section 58 of the Irrigation District Act was violated by reason of the interest of the officers in the sale of the bonds. The question involved four officers in the sale of the bonds which were not paid for or delivered, and by virtue of the provisions of said Irrigation District Act the officers making the sale or connected with it could not have any interest in the bonds bought and such sale to them or their assignees was void. Clearly this is not in point.

The next case cited is *Holm v. Bramwell* (erroneously cited at 30 Cal. App. (2d) 332, but which appears in 67 Pac. (2d) 114.) This case involved a mechanics lien. The contract was procured contrary to law and by a contractor in violation of the Contractors Law. The law itself prohibits *suits* by sub-contractors not licensed under the act, and the question involved the validity of the mechanic's lien secured under said subcontractors licensing law, and a suit thereunder. The law itself prohibits the bringing of the suit and the Court so held.

Again, in the next case cited *Citizens, etc. v. Gentry*, 20 Cal. App. (2d) 332, the Court was called upon to interpret the relationship between the contractor and the subcontractor, and the contractor's license under which the subcontractor worked. No such question appears here. Obviously, if one secures the right to sue under a particular law he must follow the permission given in that law to the letter.

No statute makes entering into the contract unlawful, without a license or permit. Both parties had the legal right to enter into this contract.

Again, *Houston v. Williams*, 53 Cal. App. 267, cited by defendant, involves a question of the fee to a real estate broker. The suit was brought for a fee rendered. The Act provided the manner in which suit should be brought. The contract for services was rendered before the plaintiff had a license. In upholding a judgment in favor of the plaintiff the Court held he could recover if he secured the license later. The Brokers License Act also provided that if a compliance with the statute was not made, suit would not lie. The Court held as a matter of law the contract was not void *ab initio* and suit would lie under it.

To the same effect, *Holm v. Bramwell* (supra).

Defendant misconstrues the meaning of the phrase "*ab initio*". Certainly, the contract here entered into was not void from its inception. By the widest interpretation it could not be said that the purposes of this contract were contrary to public policy and therefore contrary to the law. Obviously not. There is no



causal connection between the purposes of that contract, i. e., the leasing of four automobile trucks to the appellant, and the operation of said automobile trucks by the appellant without a permit for that particular job. Now, it must be remembered that all of these automobile trucks had a license to operate. The revenue raising measures only concerned the hiring out to the public at large in the same capacity as a common carrier. In such cases the Railroad Commission had the right to insist a permit was issued, and upon failure to have a permit, certain fines and penalties could be invoked. (See *Zierner* case supra.) They were never invoked here.

So, in the case of *Hann v. Steinman*, 159 Cal. 142, this was a contract case involving the rescission of a contract on the grounds of mutual mistake. The contract was to erect a building contrary to law. Both parties were mistaken that such a building could be built. Upon the rescission, the Court held that under the circumstances this was a proper remedy. No question of illegality of contract at all was involved.

*Dunn v. Stegmann*, 10 Cal. App. 38, involved the erection of a saloon near a church. Both parties knew that there was a law preventing the erection of such saloon, and, in violation of said law, agreed in writing to erect such saloon. Obviously such is not the case here.

There is no evidence that a license or a permit could not be obtained. In fact, a license was applied for and appellant assured appellees that it was not necessary

to have a license because the hauling was to be done within the property of the Bethlehem Steel Company. Besides, the Macco Construction Company had a permit and the automobile trucks were under its supervision.

*Brasher v. Giannini*, 131 Cal. App. 706, is not in point. In that case the plaintiff paid \$5600 deposit for wine during the prohibition era under the impression that she could distribute the same as sacramental wine. She was told by the defendant that she could qualify as such distributor. Upon being informed that she could not qualify under the prohibition laws, she sued for a recovery of her deposit. In upholding such a recovery, the Court held that she was entitled to rescind and to a return of her money on the grounds of a mutual mistake. Certainly, this case is not in point.

If a permit was needed, the duty rested upon the appellant Macco Construction Company. It is appellees' contention that no permit was necessary.

In *Schroeder v. Wheeler*, 126 Cal. App. 367, also cited by defendant, plaintiff at the request of another performed legal services which involved the services of a patent lawyer as well as the services of the lawyer in the State. The Court held that the plaintiff could recover for legal services rendered to defendant as patent lawyer, but could not recover for services for which he had no license to perform in California. A recovery was sustained for services rendered as a patent lawyer.

Appellant confuses the doctrine of law between contracts *malum in se* (against good morals) and those which are *malum prohibitum* (merely prohibited by statute). Contracts *malum in se*, of course, are void as being against public policy and good morals, and are usually founded upon a statute which has for its purpose the qualifying of individuals and corporations to do business according to skill and education, and for the protection of the public at large. Contracts which are *malum prohibitum* are merely revenue raising, and of course, if the parties are *in pari delicto*, the Courts will not enforce a contract. But where there is no question of public morals, the contract itself is enforceable and valid, and the parties are not *in pari delicto*. All of the cases cited by appellant confuse this distinction. For example:

*Gardner v. Tatum*, 81 Cal. 370. In this case a physician practicing medicine in the State of California when he had no legal right to practice was prevented from recovering for the services he rendered before he was licensed to practice. Of course, this case has no bearing and is no authority for the rendering of personal services and the leasing of automobile trucks.

In "Restatement of Law" there is set forth a number of exceptions to the rules of enforceability of contracts where a permit might be necessary to perform part of the work. For example:

"Where a party is ignorant of the fact that a license might be necessary."

Restatement, #599.

“Where the illegality is unessential and might be disregarded without defeating the primary purpose of a contract.”

Restatement, #603.

“If the object of a statute or ordinance in imposing the requirement of a license is for the purpose of raising revenue, the contract made by an unlicensed person, the contract is valid even though he may be subject to a penalty for his failure to secure a license.”

*Wood v. Krepps*, 168 Cal. 382, 143 Pac. 691;

*Levinson v. Boas*, 150 Cal. 185, 88 Pac. 825;

*Payne v. DeVaughn*, 77 Cal. App. 399, 246 Pac. 1069;

Restatement of Law, #580.

The case of *Wise v. Radis*, 74 Cal. App. 765, cited by appellant, involved a real estate broker who sought to evade the Real Estate Brokers Law by acting through another agent and is not in point. Naturally, anyone who seeks to evade a law in conjunction with an unlawful act of another person cannot use the law for the purpose of such evasion.

The contract between Farr and Sinclair and Macco Construction Co. for their personal services and for the furnishing of four automobile trucks was lawful. No permit of any kind or character was necessary for the furnishing of such equipment, and such services.

Appellant cites *Industrial Development Co. v. Goldschmidt*, 56 Cal. App. 507. Here the premises were rented as a saloon under a lease that such premises were to be operated as a saloon. When the prohibition

amendment became operative the continuation of the business was contrary to law and the defendant's lease terminated. Plaintiff sued for rent on the lease. Relief was denied on the grounds that the law made it unlawful to use the premises as a saloon. Certainly, there is no comparison between the operation of a saloon contrary to law and the facts in the instant case.

The agreement between Farr and Sinclair and the Macco Construction Co. was legal. Therefore, the cases cited by appellant are not in point.

See:

*Fewel & Davis v. Pratt*, 17 Cal. (2d) 85;

*Davis v. Chipman*, 210 Cal. 609;

*Duntley v. Kagarise*, 10 Cal. App. (2d) 394.

These cases involved contracts prohibited by statute. They were saloon cases, commissions for real estate brokers, and the like. Naturally, if one would agree to make counterfeit money and then sought to enforce such a contract, he would be denied relief because the contract was illegal and the purposes of the contract were illegal. Both parties would be *in pari delicto*. But in the instant case no such set of facts appears.

Appellant also cites:

*Tatterson v. Kaehrlie*, 88 Cal. App. 34;

*Payne v. DeV Vaughn*, 77 Cal. App. 399;

*Napa v. Calistoga*, 38 Cal. App. 477.

In *Tatterson v. Kaehrlie*, supra, the plaintiff sued for damages for fraud in the sale of stock to him without a legal permit from the State of California for the sale of such stock. The Court held that damages could be recovered.

*Payne v. DeVaughn*, supra, was a case of an architect suing for a fee for work performed when he had no license to act as an architect.

In *Napa v. Calistoga*, supra, the question involved was one of pleading. A demurrer was sustained without leave to amend because the complaint did not allege permission of the Railroad Commission to sell property of a public utility as provided for in a statute in existence at that time.

However, in *Jefferson v. Burhans*, 85 Fed. 949, it was held that "a defendant cannot take advantage of the fact that the contract sued on is alleged to be illegal without pleading that defense and raising that issue in the pleadings".

Contracts involving *malum prohibitum* are enforceable. In *Gelpecke v. City of Dubuque*, 68 U.S. 221, the Court held that in contracts which might require a permit or parts of which may be illegal if performed while other parts are legal, the legal parts are enforceable.

"Where part of a contract is complete and it can be determined what damage was suffered, the balance may be enforced."

*McCullough v. Mitchell*, 71 Fed. (2d) 17;

*Fitzgerald v. Union Central Life Insurance Co.*, 42 Fed. (2d) 76;

*U. S. v. Bradley*, 35 U. S. 343;

30 L. R. A. 834.

Even though the parties to an action have been engaged in a transaction which is either *malum in se* or prohibited by law if the cause of action between them

is disconnected from the illegal action and not founded upon distinct and collateral causes, then the plaintiff is not obligated to resort to illegality in order to maintain the suit and the illegality of the former act will not impair or bar the right to maintain the suit. The test is whether the agreement sought to be enforced can be separated from the illegal act relied upon as voiding it.

*Armstrong v. American Exchange Merchant Bank*, 133 U.S. 433;

*Dent v. Ferguson*, 132 U.S. 50;

*Hoffman v. McMullin* (C.C.A.9th), 83 Fed. 372;  
12 *Amer. Juris.* 719.

No case cited by appellant holds that under the circumstances present here the contract was void. Indeed, it would be a travesty on justice if one could take advantage of the work and effort of these plaintiffs, accept all the benefits, and then be relieved from paying compensation because plaintiffs, following the direction of the defendant, might be caused to violate some revenue statute. The trucks being under the control of the drivers of the appellant and the appellant instructing said drivers where to go, appellant was presumed to have the knowledge whether or not those trucks could be driven at the places they were so instructed to travel. Assume that the appellant, instead of instructing its drivers to drive these trucks on the public street, drove them on the property of third persons without the permission or consent of such third persons. An act of trespass, of course, had been committed. Trespass, of course, is unlawful. Could

it be said that because the drivers followed the instructions of the appellant in violating the law therefore the appellant would not be responsible for the contract price of hire of these trucks because of such unlawful act? All directions as to where the dump was to take place were given by the Macco Construction Co. Therefore, if in following out those instructions a law was violated, certainly it has no connection with the contract for hire.

Laws requiring licenses are divided into two classes: (a) those laws enacted for the purpose of raising of revenue, and (b) laws for the protection of the people such as corporate securities laws, licenses to practice law, licenses to practice medicine, dentistry, etc. If the laws are enacted for revenue, such as the licensing of automobile trucks and the like, and if a penalty is imposed for failure to secure such a license wherein there is no prohibition in the statute itself against the entering into a contract, then these contracts are enforceable under the law and a violation thereof does not make such contract a contract *malum in se*.

*Van Wyke v. Burrows*, 98 Cal. App. 415;

*Wood v. Krepps*, 168 Cal. 382;

*Merchants Storage v. Insurance Co. of North America*, 151 U. S. 368;

*Ziemer v. Babcock & Wilcox*, 22 Fed. Supp. 384;

20 L. R. A. 834.

Along this line comes a class of cases regarding the internal commerce laws such as the granting of rebate contrary to the provisions thereof. In these cases the



Courts have held that the contracts are not void and an action may lie.

*Louisville v. Maxwell*, 237 U. S. 94;

*Louisville v. Williamson*, 87 Fed. (2d) 34.

In the *Louisville v. Williamson* cases the rates charged were in violation of the Internal Commerce Act. A suit was brought for the difference in rates. The defense was made the contract was void because it violated the Internal Commerce Act. The Court held that the contract was not void and a suit would lie. There was no question of the parties being *in pari delicto*; there was no attempt to evade any law by either party, and the fact that a lesser rate was charged was far removed from the contract.

In commenting again on the question of the nature of a contract, in *Lloyd v. Johnson*, 45 App. D. C. 322, the Court held:

“Where the purpose of a statute is to raise revenue and not to regulate such occupation, and no question of public policy or morals is involved, a contract made by one engaged in such occupation without having taken out a permit is not void.”

Also, in the case of *In re Brown*, 24 Fed. Supp. 166, the Court emphasized the fact that because one of the parties failed to take out a license which was imposed for revenue purposes, and which provided a penalty upon the failure to do so, this would not necessarily of itself make the contract void, and used the following language:

“An executed contract may not be set aside because one of the parties thereto has failed to

take out a license imposed for revenue purposes when a penalty only is imposed on the party not complying.”

To the same effect is *Ziemer v. Babcock & Wilcox*, 22 Fed. Supp. 384,

“Where by a contract admitted to have been entered into by and between the parties, plaintiff agreed to and did perform certain services and in consideration of which defendant agreed to pay plaintiff, it cannot be held that the contract is illegal and void or unenforceable nor impose non-performance because of failure to take out a license.”

6 *Corp. Juris* 721.

To the same effect:

*Merchants Storage v. Insurance Co. of No. America*, 151 U. S. 368.

The burden of proving the illegality of this contract rests upon the defendant and it has to prove it by sane and convincing evidence. There is no evidence in the record of any illegality in connection with the execution of the contract and the performance of the work thereunder. All of the authorities heretofore cited by appellant have no application to the issues at bar.

The whole question about the legality of contract is disposed of by referring to the case of *Ziemer v. Babcock & Wilcox*, 22 Fed. Supp. 384. This case involved a Nevada law to the effect that “one who operates a motor vehicle upon state highways must pay a license fee”. The defendant did not pay the license fee and

the Court, in upholding the contract, used the following language:

“Under the Nevada law, one who operates a motor vehicle upon the state highway must pay a license fee. This is undisputed. However, an executed contract cannot be set aside because one of the parties thereto has failed to take out a license imposed for revenue purposes when a penalty only is imposed for its violation. The contract of employment itself entered into was not rendered invalid by reason of the failure of the defendant to take out a license to operate as a motor carrier. This is remote from the relationship between the parties.”

Again, in the case of *John A. Rosasco Creameries v. Cohn*, 276 N. Y. 274, 11 Northeastern (2d) 908, it was held:

“If the statute does not provide expressly that its violation will deprive the parties of their right to sue and the denial of relief is wholly out of proportion to the requirements of public policy, the right to recover will not be denied.”

In the above case there was a suit based upon a contract for the sale of milk. The statute provided that a license should be issued before one could engage in that business. The Court held that the license was one of revenue. Similar cases are cited at 118 *A. L. R.* 651. (See also, *Patterson v. Southern Railroad Co.*, 198 S. E. 364.)

**(b) CONDITION OF THE EQUIPMENT.**

The equipment of the appellees was suitable for the purposes of the contract. This phase was a factual question which the jury resolved in favor of the appellees. The testimony of Farr and Sinclair (Tr. p. 81) and of Herbert Thiel (Tr. pp. 65-70) was ample to support the findings of the jury. The jury was not bound to decide in conformity with the testimony of a number of witnesses as against a lesser number or other evidence which appears with more convincing force. One witness is sufficient for proof of any fact.

*Huddy v. Chronicle Publishing Co.*, 15 Cal. (2d) 554.

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**(c) THE DEFENSE OF NOVATION IS NOT TENABLE.**

Appellant having failed to dispose of the verdict on technical grounds, next advances the defense of novation. Here, again, there is no issue raised by the pleadings to this effect, nor was it mentioned in any pre-trial conference. However, let us explore its merit.

Novation is the substitution of any obligation for an existing one. Under the law, a novation is made by (1) a substitution of a new obligation by the same parties with an intention to extinguish the old; (2) by the substitution of a new debtor; or (3) by a substitution of a new creditor.

“A novation is subject to the general rules governing contracts.”

*Calif. Civil Code*, Sec. 1532.

“That being so, it requires consideration.”

*Manfree v. Schock*, 210 Cal. 279, 292 Pac. 465.

“And further requires an intention to discharge the old contract.”

*Blummer v. Madden*, 128 Cal. App. 22, 16 Pac. (2d) 319.

“And such intention must be clearly indicated by all parties. A novation should not be confused with modification or alteration.

“A contract of novation must be supported by sufficient consideration.”

*Pearsall v. Henry*, 153 Cal. 314.

“There must be a substitution of a new obligation which changes the rights and relationships of the parties.”

*Young v. Benton*, 21 Cal. App. 314;

*Lindner Hardware Co. v. Pacific Sugar Co.*,  
17 Cal. App. 81;

20 Cal. Juris. 249.

“A mere modification of the terms of the original contract such as an extension of time is insufficient to show an intention that it shall operate as novation.”

*Parkside Realty Co. v. MacDonald*, 166 Cal. 426.

“Where an agreement changes the obligation of the parties in no respect but relates merely to remedying defects in performance, etc., there is no novation.”

*Hallensleben v. Heine Piano Co.*, 54 Cal. App. 295.

The effect of novation is to extinguish the old obligation and substitute a new obligation. The rights of the respective parties thereafter are governed by the new obligation.

Now, let us apply the foregoing general rules to the facts here. What happened was this: At a certain time in the early stages of the performance of this contract the weather at the Bethlehem Steel Co. plant was such that it made it impossible to do the work under the conditions originally contemplated. It had rained consistently for ten or fifteen days prior to December, and during the early part of December. There were no roads, the mud was deep and there was very little traction for the trucks. Difficulties encountered were inescapable and not anticipated by Farr and Sinclair, or any other persons working for the Macco Construction Co. It became necessary to change the equipment on the trucks to meet these conditions. On some occasions it was necessary that caterpillars haul out trucks stuck in the mud; on other occasions due to the sluggishness of the dirt to be removed, the steamshovels broke sideboards, some of the dirt fell on the cabs and it was necessary to take proper precautions to see that this did not re-occur. In order to meet these contingencies, steel planks and steel shields were placed over the cabs. Defendant's agents said nothing about a change in the terms of the contract. Nothing was said about paying more or less than \$2.70 per truck per truck hour; nothing was said about paying more or less to the truck drivers than \$1.43; nothing further was said

about the duration of the contract, nor the length of time necessary to complete the work; nothing was said as to whether the work would go on 21 hours a day or for 8 or 12 hours a day; nothing was said as to how long the plaintiffs would remain on the job; there was no substitution of any kind or character in the original terms of the contract. At most, all that can be said was that the trucks furnished by the plaintiffs were to be equipped with steel sideboards and a steel shield. Could this be interpreted as a substitution of a new obligation for the old? Was anything said that the job was not to last four months? Is there any evidence that at that conversation the original contract was changed?

We have no quarrel with the authorities cited by the appellant, but they are not in point. It cannot be said that the novation as described in pages 42 and 43 of the appellant's brief had anything to do with the license to haul over public streets. Certainly if it is contended that the novation occurred because the drivers of the defendant using the plaintiffs' trucks were directed to haul the dirt from the Bethlehem property to some other location, that in itself is not sufficient to justify a novation. The necessary elements are lacking. All that could be said is that there was a modification of the place where the trucks were to dump their loads.

There was no consideration; there was no substitution of the payment to be received; there was no substitution of the payment to be made to the drivers; there was no consideration for the alleged substitu-

tion or novation; there was no substitution as to the length of time to be worked by the plaintiffs, or the duration of the contract; and there was no new legal obligation.

Appellant's cases are not in point.

In *Prafd v. Strain*, 11 Cal. App. 74, cited by appellant, plaintiff had a contract to be paid on a commission basis for the sale of cabbage. Subsequently he purchased the cabbage under a new contract. The Court properly held that upon the substitution of a contract to purchase rather than a contract to pay, the second contract was in force and the first contract was properly extinguished.

In the next case cited by appellant, *Producers Fruit v. Goddard*, 75 Cal. App. 737, an oral contract and a written contract were involved, each contradicting the other, and the Court properly held that if an oral contract was made subsequently and with an intention to substitute for the written one, the written one became *functus officio*. Surely, in the instant case, there is no evidence that any contract was substituted for and in the place of the original contract made and entered into, relied upon and performed by the parties hereto. What proof or conduct is there to point to an attempt of these plaintiffs to substitute any new contract for their original contract? There is no merit in the novation theory.



### 3. DAMAGES.

(a) The damages were not excessive. This case was tried before a jury. It unanimously resolved all questions of fact as to the existence of a contract, and the duration thereof in favor of appellees, and awarded damages in the sum of \$2500. The Courts are reluctant to disturb a verdict unless it is clearly against the weight of evidence. Where there is substantial evidence to support the verdict it will not be set aside unless it will result in a miscarriage of justice. The mere fact that there was a conflict in the evidence as to the extent of the damages suffered is not sufficient grounds for setting it aside or awarding a new trial. A perusal of the evidence discloses substantial evidence to support the verdict.

The evidence demonstrates that upon the execution of the contract and assignment (referred to as Plaintiffs' Exhibit A) plaintiffs purchased from Young & Son equipment for the sum of \$3500; as a result of the termination of the contract by defendant, they became indebted to Young & Son to the extent of \$1500. In addition thereto, for improvements, repairs, tires, etc., they spent the sum of \$1100. (Tr. p. 96.) The net profit per truck was seventy-five cents per hour per truck worked, and basing it upon the contemplated work, profits would have amounted to \$63 per day, for four trucks. This is arrived at by an accurate account of the expenses per truck hour, and is based upon the actual expense that occurred on the job with the exception, of course, of those items which are charged to capital investment. It must be

remembered that all of these trucks were overhauled completely and new tires were put on them. Witness Sinclair testified as to operating costs (Tr. pp. 85 to 120):

Insurance . . . . .	\$ .27	per truck hour (p. 86)		
Gas, oil, grease, etc. . .	.58	“ “ “		
Mechanic's time . . . . .	.32	“ “ “		
Parts . . . . .	.42	“ “ “		
Breakdown time . . . .	.36	“ “ “		

---

Total expenses . . .	\$1.95	“ “ “		
----------------------	--------	-------	--	--

Amount paid .	\$2.70			
---------------	--------	--	--	--

Total				
-------	--	--	--	--

Expenses . . .	1.95			
----------------	------	--	--	--

---

Net profit . . . . .	\$ .75	“ “ “	(p. 85)	
----------------------	--------	-------	---------	--

Net profit on				
---------------	--	--	--	--

four trucks . . . . .	3.00	“ “ “		
-----------------------	------	-------	--	--

The question of cost and overhead is arrived at as follows:

*Insurance:*

The actual insurance cost while on the job was \$172.60. This amount divided into the actual amount of hours the trucks worked amounts to the figure of 27¢ per truck hour. (Tr. p. 86.)

*Gas, oil, grease, etc.:*

The actual cost of gas, oil, grease, etc., while on the job amounts to \$374.82. This amount divided into the actual number of hours the trucks worked amounts to 58¢ per truck hour.

*Breakdown:*

Out of a total number of hours worked before termination of the contract, the trucks were actually down 55 hours. This amounts to \$148.50 in truck time lost and \$92.34 in drivers' time lost, making a total of \$240.84. This amount divided into the total number of hours the trucks worked gives the amount of 36¢ per truck hour. This figure is higher than that testified to by defendant's manager.

*Parts, etc.:*

The amount spent while on the job was \$262.34. In addition there was \$21.35 spent and charged to defendant. The total amount spent while on the job was \$283.69. The amount divided into the total amount of hours the trucks worked amounts to the above figure of 42¢ per truck hour. This amount does not include, however, money spent for capital investment, but only refers to parts used on the job.

*Mechanics' time:*

The only equitable manner in which the figure of 34¢ per truck hour can be computed is to figure how much it would be under normal operating conditions; plaintiffs intended using one mechanic per shift which would amount to \$9 for 28 truck hours. By dividing \$9 by 28, a figure of 32¢ per truck hour is arrived at. It is true that the mechanics' time cost more than this because prior to the time that the truck operated

overhaul work, tuning up, etc. was done for the purpose of getting the trucks in shape for the service. This expense, however, is not charged as overhead but is charged as capital investment. It is customary to expect some trouble at the start of any job. Of course, with the extraordinarily bad weather conditions that prevailed, normal operating conditions did not prevail at the start and it was necessary therefore to outlay a greater expenditure at the start which expenditure would not reoccur as the job progressed.

In addition to the \$2.70 per truck per truck hour, appellant also agreed to pay \$1.43 per man per truck hour. No consideration in the foregoing figures is therefore given to the expenses of the drivers as these are taken care of by the above amount of \$1.43 which was paid by the appellant directly to the drivers as above indicated. Part of this amount was for social security, insurance, etc. The evidence showed on the days worked, appellant did not avail itself of the use of all the equipment of appellees. Appellant computes, however, the total amount of job days worked on that basis without demonstrating or showing the reason appellees' trucks did not work was because they were not permitted by the appellant to work.

Appellant's figures are not accurate. For the purpose of argument, let us assume that the  $17\frac{1}{2}$  days of 21 hours each amounts to 366 hours; based upon a profit of 75¢ per hour for four trucks, or \$3 per hour, this shows a profit of \$1098 for  $17\frac{1}{2}$  days' work.

The total number of days the job took was 55 1/6 days, plus 8 days for cleaning up. (Appellant's Opening Brief, p. 10.) At the rate of \$63 per day profit, the damages would amount to \$3475 for four trucks for 55 1/6 days, as based on the appellant's computation.

However, that is assuming the figures given by defendant are accurate; but this action is based upon an alleged breach of contract for hiring for a period of four months. Damage was for this breach.

Appellant has indulged to some extent in the manipulation of figures to justify a contention that the damages are not sustained by the evidence. Again, the jury accepted the appellees' interpretation and found as a fact that the appellees had been damaged.

The test given for the measure of damages has been sustained in various decisions by our Federal Courts. In 110 U. S. 338, it has been held that for the breach of an obligation on contract, damages, if ascertainable, can have included the loss of prospective profits as well as any outlays necessary in the preparation for the undertaking of such work.

In *Grand Trunk Railroad Co. v. Nelson*, 116 Fed. (2d) 823, 837, the Court held:

"In calculating damages to a contractor when, without his fault, the other party during the progress of the work, delays or terminates it, the object is to indemnify the innocent party for the losses sustained and gains prevented by the action of the guilty party, considering these elements in relationship to each other. The profit

and loss must be determined according to the circumstances of the particular case and overhead expenses as well as original outlay should be considered.”

In *U. S. v. Purcell Envelope Co.*, 249 U. S. 313, the Court, in dealing with the measure of damages for the alleged violation of a contract to perform, laid down the rule that the law of estimated profits was a correct measure of damages.

To the same effect:

*Philadelphia Railroad Co. v. Howard*, 54 U. S. 307;

*White River Levee District v. McMillan*, 40 Fed. (2d) 873.

“The fact that damages are uncertain or difficult of ascertainment does not prevent recovery.”

*Ironton v. Harrison*, 212 Fed. 353;

*Invey v. Phillips Petroleum*, 36 Fed. Supp. 811;

*American Can v. Frankhauser*, 279 Fed. 727;

*Hanley v. Delaware Railroad*, 21 Fed. 541;

*Rudolph v. Johnson*, 127 Cal. App. 461;

27 Fed. Digest 103.

Appellant states that the drivers were to be paid by the appellant and this amount should be charged back as part of the overhead. Of course, to indulge in this theory instead of figuring that the plaintiffs would be paid \$2.70 per truck per truck hour, it would be necessary to add the sum of \$1.43 per truck per truck hour and the result would be the same. This item has been left out of the computation be-

cause it does not give a true picture. Also, there was left out the item of tires, as no depreciation was taken into consideration for the reason that all of that was charged to original investment and it was not necessary to take into consideration what was spent for the capital investment. After the job was finished the capital would be depreciated of course, or it might have been increased as subsequent events further developed. The jury, in arriving at the verdict, had before it all of the elements which make up overhead, and determined the damages accordingly. Workmen's compensation and Social Security were paid out of the \$1.43 which was paid by the defendant and has no place in the computation.

It is not true, as appellant contends, that fixed expenses remain constant to such an extent that the trucks worked 42 per cent of the time. There were unusual conditions existing at the start of the job and those conditions disappeared after the job was commenced. The weather became better, the roads were more workable, and the men could gain access to and from the loading zones more easily. So, with better conditions the cost of operating, and the cost of repairs would naturally be lessened and the profit increased. Appellant takes isolated figures and by juggling them, assumes that the trucks worked only 42 per cent of the total work time. That is not a fair nor an accurate test. The fact is that the work sheet showed the number of hours actually worked and there is no evidence contrary to show that the trucks were not available and in working condition

when called upon to work. The fact is that of the time they were called to work the breakdown time was nominal. This was one of the issues submitted to the jury and it found contrary to the appellant's contention. On page 16 of appellant's brief, appellant sets forth a computation which it made up for the purpose of demonstrating a loss rather than a profit. This matter was before the jury and the jury decided contrary to such computation. It is not based upon actual expenditures nor is it based upon any records of Farr and Sinclair, but solely upon records which were made up by Mr. Tucker, the appellant's accountant. All of the figures used by Farr and Sinclair are accurate figures. There is no need of speculation. There is no merit in the position that capital investment should be considered in arriving at a profit. The decisions hold to the contrary.

It is perfectly obvious that the \$2500 in damages is fair and reasonable. The jury would have awarded more if it could have awarded damages to take care of additional expenses outstanding.

Answering the various specifications of errors the appellee states:

1. That it was not necessary to secure a permit from the Railroad Commission of the State of California. The contract was not illegal. The law requiring a license was revenue raising and therefore *malum prohibitum*. If it was necessary to secure such a license the appellant is estopped at this time from invoking such a defense on the grounds that it was the party directing where the loads of dirt were to



be dumped, it had control over the drivers. All it hired of the appellees was the equipment and the services of the appellees.

2 and 3. The evidence justifies the award of damages. It being a factual question resolved in favor of the appellees by the jury, the reviewing Court will not disturb such a finding. The evidence affirmatively supports the amount of damages rendered by the jury.

4. The question of duration of the contract was a factual one and resolved in favor of the appellees.

5. No novation took place as no new contract was entered into.

6. The question of fact was submitted to the jury as to the breaching of the contract and the jury finding in favor of the appellees on a factual question will not be disturbed by the reviewing Court.

7. The action of Young & Son was dismissed and no prejudice was suffered by the appellant by such dismissal. As a matter of fact, Young & Son had sued the appellees and such action was pending at the time of the hearing of this suit. The action here was one for damages for the breach of contract and it was not contemplated that Young & Son were to receive such money but were only to take a certain sum out of that which was earned under the contract.

No prejudicial error was committed by the trial Court on any of the motions made in refusing to give any of the instructions. What occurred to cause the breach of contract was simply this: Defendant would have to pay a penalty if the work was not com-

pleted before the expiration date in April. Due to the inclement and very unusual weather which prevented steamshovels and other work in the manner originally contemplated, the work had slowed down, trucks got stuck in the mud, shovels could not be moved from one location to another; the work did not progress as contemplated. During this period appellant's trucks were busy in San Diego; they were larger trucks than those furnished by the appellees; the San Diego job was completed before schedule, releasing appellant's trucks for the San Francisco job. It was more economical for appellant to operate its own trucks, which it did at or about the same time it discharged appellees and terminated the contract without cause and placed its own trucks on the job. It must be remembered that among the other contentions of the appellant was that the equipment of the appellees was not satisfactory for the purposes for which it was hired. Apparently this contention has been abandoned as it certainly is not consistent with the position that there never was a meeting of the minds or that the contract is void.

It is respectfully submitted that the judgment should be affirmed.

Dated, San Francisco,  
February 8, 1943.

Respectfully submitted,

PHILLIP BARNETT,

*Attorney for Appellees,  
A. L. Farr and R. P. Sinclair.*

No. 10312.

IN THE

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

---

MACCO COSTRUCTION COMPANY, a corporation,

*Appellant.*

*vs.*

A. L. FARR, R. P. SINCLAIR AND YOUNG & SON CO., LTD.,  
a corporation,

*Appellees.*

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## APPELLANT'S REPLY BRIEF.

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**FILED**

FEB 19 1943



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## APPELLANT'S REPLY BRIEF.

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The brief filed on behalf of appellees contains so many statements that are not only entirely unsupported by the evidence but are also absolutely untrue that we deem it necessary to file a reply brief in answer thereto.

### I.

#### Statement of Alleged Facts Contained in Appellees' Brief.

On page 8 appellees say:

“The evidence discloses . . . that the appellant had control of the drivers.”

On page 14 appellees say:

“That the defendant had a permit and the trucks were under its supervision.”

There is no evidence to support any of these statements. In fact since the defendant was not engaged in the transportation business it did not require and, therefore, did not have a permit under the City Carriers Act.

Defendant did not have control of the drivers, nor supervision of the trucks except to direct the drivers where to haul the dirt. Plaintiffs were personally on the job all of the time and were in complete control of the operation of the trucks. Both plaintiffs testified that they were not employees of the defendant but that they were engaged in the operation of their own trucking business [Tr. pp. 58, 101]; that they supervised and watched the drivers, on occasions firing them, and that on other occasions the defendant asked them if they could "absorb" drivers which the defendant had on its hands. [Tr. pp. 61-62, 64, 113.]

Witness Burch testified that sometimes plaintiffs did tell him that they needed drivers but that on other occasions they would procure the drivers themselves, and that the drivers would report directly to the plaintiffs. [Tr. p. 146.] It is true that the defendant actually paid the drivers but it did so merely as an advance to the plaintiffs. The defendant, however, not only paid the drivers but also advanced many other expenses incurred by plaintiffs, such as wages of mechanics, gas, oil and grease, drivers' and mechanics' Compensation Insurance, Social Security and Old Age Insurance and it also as an advance, paid for certain tires and parts for the trucks. The evidence conclusively shows that the plaintiffs continued the operation of their individual trucking business and that it was they who were operating the trucks and not the defendant.



Again on page 8 appellees state that:

“It was only after working for some time and after unusual and severe weather and due to the muddy condition of the roads and property that the drivers were directed to go outside of the property of the Bethlehem Steel Company.”

There is absolutely no such evidence in the record. On the contrary the evidence was, that at the start of the job a few thousand yards of dirt were to be hauled on to the Bethlehem property and the rest was to be hauled to the waste dump on Third street, some 4000 feet away. [Tr. pp. 149-150, 155-156, 175, 193.]

On page 26 appellees state:

“That at a certain time in the early stages of the performance of the job the weather was such that it made it impossible to do the work under the conditions originally contemplated; that it rained constantly for ten to fifteen days prior to December, and during the early part of December; that there were no roads; that the mud was deep and that there was very little traction for the trucks; that the difficulties encountered were inescapable and not anticipated by any one.”

Again on page 38 appellees refer to the

“very unusual weather which prevented steam shovels and other work in the manner originally contemplated, the work had slowed down, trucks got stuck in the mud, shovels could not be moved from one location to another; the work did not progress as contemplated.”

All of these statements are absolutely unsupported by the evidence and in fact the only evidence with regard

to weather conditions is found on pages 68 and 70 of the transcript that

“they did have some sloppy weather; that on occasions trucks had to be hauled out by caterpillars”

and that on one occasion

“it was raining at the dump being very soft there so that the rear end of the truck sank down to the bedding.”

As to weather conditions being in contemplation of the parties, it must be remembered that the job was to be done during the winter and the Court takes judicial notice that rain in California may be expected at that period of the year.

Again on page 8 appellees say:

“The need of a permit is too remote from the cause of the breach.”

We are unable to answer this statement as we do not understand what it means.

On page 13 appellees say:

“That the fines and penalties for operating without a permit from the Railroad Commission were never invoked against the plaintiffs”

There is no such evidence in the case despite the fact that both plaintiffs were on the stand and testified.

On pages 13 and 14 Appellees say:

“That a license was applied for and appellant assured appellees that it was not necessary to have a license because the hauling was to be done within the property of the Bethlehem Steel Company.”

Again there is no evidence to support any such statement and it is, in fact, untrue.

On page 19 appellees say:

“That it would be a travesty on Justice if the defendant could take advantage of the work and effort of the plaintiff, accept the benefits, and then be relieved from paying compensation because the plaintiffs might violate the law.”

While this happens to be the law, nevertheless the defendant has at no time refused to pay the plaintiffs for the work done by their trucks.

On page 19 appellees also say because appellant directed the trucks where to go, it was presumed to have had knowledge whether the trucks could be driven to those places. This certainly is a *non sequitur*. Appellant having directed the trucks to go to a certain place and plaintiffs having made no objection thereto, the defendant was entitled to presume that the plaintiffs had the legal right to comply with its directions, including possession of any permits required by plaintiffs to enable them so to do.

On pages 32 and 35 appellees say:

“That in addition to \$2.70 per truck hour appellant also agreed to pay \$1.43 wages per man per truck hour, and that this figure included Social Security Insurance, etc.”

Again the evidence utterly fails to support the latter part of this statement. In fact this \$1.43 is the nearest even figure obtainable by dividing \$10.00 per day, the actual wages of the drivers, by seven, being the number of hours worked per day per driver. It did not include

the employer's share of Social Security or Old Age benefits nor any amount for Compensation Insurance on these drivers.

Again on page 32 appellees say:

"That the reason their trucks did not work more while they were on the job was because they were not permitted by appellant to work."

Again this is not supported by the record. On the contrary it appears, even from plaintiffs' own testimony, that the reason the trucks did not work more was because they were not in condition to do so.

On page 35 appellees say:

"That there is no evidence to show that the trucks were not available and in working condition when called upon to work."

In addition to the numerous witnesses produced by the defendant, plaintiffs' own testimony shows directly to the contrary.

On page 36 appellees say:

"That the computation of expenses submitted by appellant was not based on actual expenditures."

The evidence is directly to the contrary, this computation being a summary of the actual amounts expended by defendant on behalf of plaintiffs and did not include expenditures made directly by plaintiffs, such as personal injury, property damage, collision insurance, parts, tires nor did it include an allowance for work performed by plaintiffs personally, nor did it include any allowance for depreciation of the trucks or their tires.

Finally on pages 37 and 38, appellees set forth what their counsel would like to believe was the reason for defendant ceasing to avail itself of plaintiffs' trucks. This statement is too long to repeat here but it may be summed up in the expression "wishful thinking," there not being one iota of evidence to support any of the statements therein except the statement that it is the contention of appellant that plaintiffs' equipment was not satisfactory for the purposes for which it had been hired.

Finally on page 38 appellees say:

"Apparently this latter contention has been abandoned as it certainly is not consistent with the position that there never was a meeting of the minds or that the contract is void."

This contention certainly has not been abandoned and we are at a loss to see where lies the inconsistency. It is appellant's contention that there was a meeting of the minds and an agreement of a hiring for an indefinite period, and so long as appellant should desire the services of the trucks. Appellant's contention that there was no meeting of the minds is limited to the supposition that the plaintiffs understood the contract to be for four months. In that event only there was no meeting of the minds. It is likewise appellant's contention that the contract was void because of plaintiffs' failure to obtain the necessary permit from the Railroad Commission. Certainly neither contention is inconsistent with the further contention that when the trucks showed up on the job and while they remained on the job, they were in no condition to perform the work contemplated at the time when the negotiations for the contract took place, whether or not these negotiations finally resulted in a valid contract.

## II.

### The Assignment.

Appellees say on page 4 that the acceptance of the assignment by the defendant constitutes strong evidence that there existed a contract between plaintiffs and defendant for the period of the job. In fact, as we pointed out in our opening brief, pages 7-8, the circumstances surrounding the acceptance of this assignment are all but conclusive that no such contract existed. Mr. O'Neill, the attorney for Young & Sons, testified very definitely that when he discussed with Mr. Wells the acceptance of this assignment, Mr. Wells stated that the defendant would not guarantee any payments to the plaintiffs and would accept the assignment only in so far as any moneys actually became due plaintiffs from the defendant, and that he drew the assignment with this in view, thoroughly understanding that its acceptance by the defendant was in no manner a guarantee that any moneys would be payable from the defendant to the plaintiffs. [Tr. p. 45.] The form of the acceptance very clearly shows the accuracy of Mr. O'Neill's testimony.

### III.

#### **Novation.**

On page 27, *et seq.*, appellees claim that no novation took place because at that time nothing was said about the rate of payment of the drivers nor the length of time which they would work. It is appellant's contention that if the original contract did contemplate the hiring of plaintiffs for the duration of the job, then a novation of that contract took place when they acquiesced in their dismissal from the job because of their faulty equipment within the first few days, and thereafter asked to be permitted to return to the job. The essential difference between the original and the new agreement (if we assume the original agreement was for a definite period) was the change from a definite period to a hiring at will, and had nothing to do with the hourly rate to be paid plaintiffs or their drivers.

In this connection we wish to call the Court's attention to the statement of appellees on page 27 as follows:

"At most, all that can be said was that the trucks furnished by the plaintiffs were to be equipped with steel sideboards and a steel shield."

This statement is absolutely incorrect. Appellant's witness Burch testified in detail as to this conversation, and that the trucks were not in shape to go to work because of faulty hose connections, fan belts, wiring, and other defects. [Tr. p. 142.]

#### IV.

### **The City Carrier's Act Is Not a Revenue Measure.**

Appellees contend, page 10, *et seq.*, that the City Carrier's Act is merely a revenue measure, and therefore does not render void a contract in violation of its provisions.

We cannot help feeling that plaintiffs' counsel is confused between the above Act and the Highway Carrier's License Law, Stats. 1933, page 928, as amended, which is the revenue measure and which does provide for a license fee of 3% of the gross receipts, which under the rate of \$2.70 per hour, would amount to 8.1¢ per hour on their gross revenue.

Not only does the City Carrier's Act (Stats. 1935, p. 1057, as amended) provide for a permit rather than a mere license, but the very preamble of that Act shows that its purpose is the regulation of the use of public highways for the common good.

For the convenience of the court, we will quote this preamble:

“The use of the public highways for the transportation of property for compensation is a business affected with a public interest and it is hereby declared that the purpose of this act is to preserve for the public the full benefit and use of public highways consistent with the needs of commerce without unnecessary congestion or wear and tear upon such highways; to secure to the people just and reasonable rates for transportation by carriers operating



upon such highways; to secure full and unrestricted flow of traffic by motor carriers over such highways which will adequately meet reasonable public demands by providing for the regulation of rates of all transportation agencies so that adequate and dependable service by all necessary transportation agencies shall be maintained and the full use of the highways preserved to the public.”

We would also call the court’s attention to *Section 2* of said Act, which reads as follows:

“*Compliance with act essential.* No carrier shall engage in the business of the transportation of property for compensation by motor vehicle over any public highway in any city of this State, except in accordance with the provisions of this act which the Legislature hereby declares to be enacted under the power of the State to regulate the use of public highways.”

Again, the first sentence of *Section 3* reads as follows:

“Except as hereinafter provided, no carrier shall engage in the business of transportation of property for compensation by motor vehicle over any public highway in any city in this State without having first obtained from the Railroad Commission a permit authorizing such operation.”

The Act then requires in some detail, as a prerequisite to the granting of a permit, the obtaining of insurance by the proposed carrier; it then provides that the rates to be charged by the carrier shall be in accordance with the rates established by the Commission and prohibits rebates, etc.; and the Act then by reference incorporates

large portions of the Public Utilities Act of the State. The Act then provides for both civil and criminal penalties, not only for operating at all without a permit, but for violation of the provisions of the Act after such permit has been obtained.

While the Act does provide in *Section 8* for the payment of certain fees, these are merely \$3.00 upon the filing of an application for permit and \$1.00 each year for renewal thereafter. It is perfectly obvious that this small fee is charged to meet the expenses necessarily incurred by the Commission in connection with the application, and is in no wise intended for the purpose of producing revenue.

Upon this point, the case of *Morel v. Railroad Commission*, 11 Cal. (2d) 488, 81 Pac. (2d) 144, is conclusive. This case deals with this very City Carriers' Act, and the court says at page 492:

"The primary purpose of such regulation is to secure the adequacy, regularity, and reliability of service, and the reasonableness of rates and charges therefor."

And again, on page 499, after quoting from the preamble to the Act, the court says:

"It is apparent therefore that one of the express purposes of the City Carriers' Act is the preservation of the highways and to that end it is declared necessary to regulate the use of the highways by those transporting property thereon for commercial purposes."

V.

**Pleading Illegality of Contract.**

Appellees contend that because the defense of illegality was not pleaded it was not available to the defendants.

The only authorities cited by appellees in support of this contention are certain cases dealing purely with revenue statutes and the case of *Jefferson v. Burhans*, 85 Fed. 949. The holding, however, in this case, as explained in *Mechanics Ins. Co. v. C. A. Hoover*, C. C. A 8th, 182 Fed. 590, 593, is merely:

“The mere fact that an agreement, *the consideration and performance of which are lawful*, incidentally assists one in evading a law or a public policy, is no bar to its enforcement.” (Italics ours.)

Moreover, a decision based upon Minnesota law would have no application to a contract entered into in California in violation of California law.

Finally, it is definitely settled by the California courts that the defense of illegality need not be pleaded, but that as soon as it appears that the doing of the act was or would be unlawful under the particular circumstances existing, such as the absence of a permit, the Court must deny any relief to the plaintiffs, and that this is not founded on any consideration for either parties to the lawsuit, but is based solely and squarely upon the fact that to permit any such recovery would be contrary to public policy. See numerous cases cited under subdivisions 10 and 11, pages 25 and 26 of our opening brief.

VI.

**Damages.**

To assist the Court in understanding the situation with respect to the financial result to plaintiffs had they continued to work on the job until its completion, we have attached hereto as an appendix a chart showing these results dependent on the amount of hours plaintiffs' trucks would have worked.

The first column of figures represents what would have been their costs per hour had each of those trucks worked the entire twenty-one hours per day, an obvious impossibility. Under the most favorable conditions trucks do require oiling and greasing and sundry current repairs. Moreover, delays and interruptions are inherent in any job, particularly one taken during the winter months—that is, the rainy season.

The next column represents the cost per hour based on plaintiffs' own estimate of the time the trucks would have worked.

The last column represents the hourly cost to plaintiffs had their trucks continued to work the same proportion of the time as they had actually worked while they were on the job.

The intermediate columns represent hourly cost based on hours per day on the trucks as set forth at the head of the respective columns.

In lines 1, 2, 4 and 5 we have used plaintiffs' own figures in each column since plaintiffs claim these figures represented cost per hour. We do not believe the evidence supports plaintiffs' contention in this respect, but for the purpose of the chart we have accepted it.

Line 4 is plaintiffs' own figure based, as they themselves say, on the trucks working 84 hours a day [Tr. pp. 107-109] which is obviously so, as \$27.00 divided by 84 equals 32¢. As this item of mechanics wages remains constant, naturally as the trucks worked a less number of hours the cost per hour for this item would increase.

Furthermore, this does not take into consideration the fact that the cost as shown by actual experience was in excess of \$1.00 per hour [Tr. pp. 159, 160, 224, 101, 102 and 103], nor does it make any allowance for the increase in cost that would necessarily be incurred by reason of the fact that this estimated cost of mechanics is based upon mechanics working only twenty-one hours a day, with no allowance for salaries and insurance of mechanics during the regular three hour shut down period which was the only time when work could have been done on the trucks without taking them off the job and necessarily stopping the revenue therefrom during such time. Actually each of the mechanics did work eight hours a day plus overtime. [Tr. p. 67.]

Line 7: Compensation Insurance on the mechanics amounted to 11¢ of the wages paid [Tr. p. 106] so the hourly cost of such insurance would increase in the same proportion as did the total amount of wages paid. The same applies to Social Security and Old Age tax on the mechanics (lines 7 and 8) which is figured at the rate prescribed by law, namely, 3.7%.

With regard to Compensation Insurance, Social Security and Old Age tax on the drivers (lines 7 and 8), we have used the constant figure as we have used a constant figure for the hourly cost of their wages.

Line 9 is the tax imposed by the Revenue Measure, namely the Highway Carriers License Act (Stats. 1933, p. 928 as amended), which plaintiffs have confused with the Act requiring a permit from the Railroad Commission.

Line 10 represents very low depreciation no matter how little the trucks worked. The depreciation on the trucks is based on a depreciation of \$200.00 per year per truck and the depreciation on the tires is based on the minimum ordinary tire depreciation only had the trucks worked forty hours a day.

Line 11 is the value of plaintiffs' time as they themselves claim. [Tr. p. 108.] They testified they were on the job twenty-one hours a day [Tr. pp. 55, 58] so that as the trucks worked less than the full twenty-four hours, the hourly amount of this item necessarily increased. Although plaintiffs testified that there was considerable duplication in their time [Tr. pp. 55, 58] we have not included this duplication in our figures.

Line 15 is the total number of days required to complete the job after the plaintiffs had left it, multiplied by the number of hours per day shown at the head of the column.

The chart does not take into consideration the \$500.00 which plaintiffs admit they earned during the period before the job was completed and which they would not have had the opportunity of earning had they continued on the job, in which latter event their financial position would have been worse by that \$500.00. The item must,

therefore, be taken into consideration in determining what their loss would have been had they continued to work on the job.

We believe that this chart shows conclusively that the gross revenue of \$2.70 per hour from these old trucks was insufficient to pay the usual and ordinary operating expenses of trucks of that age and in addition to support five people, to-wit, the two plaintiffs and at least three mechanics, a fact which was pointed out to plaintiffs. [Tr. p. 163.]

## VII.

### **Error in the Refusing of Instructions.**

It is highly significant that appellees in their brief do not even claim that the Court did not err in refusing to instruct the jury either with respect to the provisions of the City Carriers' Act or with respect to the necessity for the plaintiffs being "ready, able and willing," to perform their part of the contract before they would be entitled to recover.

Neither do appellees even argue that the failure to give these instructions did not constitute reversible error.

In this connection, it is interesting to note that appellees say, on page 6 of their brief, that the jury found that "appellees were ready, willing and able to perform." How could the jury have so found when the Court refused to submit this issue to them?

VIII.

**Appellees' Discussion of Authorities.**

In a brief of this length it will be impossible to discuss the authorities cited by appellees or to consider their discussion of the authorities cited in our opening brief. We feel confident, however, that upon an examination of the authorities cited by either party, or any additional authorities which the Court itself may read, they will all be found to support, beyond possibility of doubt, the rules of law set forth in our opening brief.

IX.

**Conclusion.**

We submit that appellees' reply brief has advanced no reasons why the judgment in this case should not be reversed with directions to the trial court to dismiss the action, but that on the contrary the very fact that appellees have felt themselves obliged in that brief to go so far afield from the record, as established by the evidence in this case, very conclusively shows the inherent weakness of their position.

Respectfully submitted,

WALTER O. SCHELL,

GERALD F. H. DELAMER,

*Attorneys for Defendant and Appellant.*



## APPENDIX.

	84 hours 100%	72 hours 86%	63 hours 75%	42 hours 50%	40 hours (Actually 39.48) 47%
1. Ins. (PI, PD & Coll)	.27	.27	.27	.27	.27
2. Parts	.42	.42	.42	.42	.42
3. Mechanics	.32	.37	.43	.64	.67
4. Gas & Oil	.58	.58	.58	.58	.58
5. Down Time	<u>.36</u>	<u>.36</u>	<u>.36</u>	<u>.36</u>	<u>.36</u>
6. Sub-Total items listed by plaintiffs	1.95	2.00	2.06	2.27	2.30
7. Compensation Ins.:					
Mechanics	.04	.04	.05	.07	.07
Drivers	.14	.14	.14	.14	.14
8. Social Security Tax:					
Mechanics	.01	.01	.02	.02	.02
Drivers	.05	.05	.05	.05	.05
9. Tax on Gross Revenue	.08	.08	.08	.08	.08
10. Depreciation:					
Trucks	.06	.06	.06	.06	.06
Tires	.20	.20	.20	.20	.20
11. Plaintiffs' Time	<u>.31</u>	<u>.36</u>	<u>.41</u>	<u>.62</u>	<u>.65</u>
12. Cost per hour	2.84	2.94	3.07	3.51	3.57
13. Revenue per hour	<u>2.70</u>	<u>2.70</u>	<u>2.70</u>	<u>2.70</u>	<u>2.70</u>
14. Loss per hour	.14	.24	.37	.81	.87
15. Hours plaintiffs trucks would have worked	<u>x3276</u>	<u>x2808</u>	<u>x2457</u>	<u>x1638</u>	<u>x1560</u>
16. Loss plaintiffs would have sustained	458.64	673.92	909.09	1326.78	1357.20



No. 10313

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United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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NATIONAL LABOR RELATIONS BOARD,  
Petitioner,  
vs.  
NORTH AMERICAN AVIATION, INC.,  
Respondent.

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Transcript of Record

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Upon Petition for Enforcement of an Order of the  
National Labor Relations Board

FILED

JAN 18 1943

PAUL P. O'BRIEN,  
CLERK



No. 10313

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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BOARD'S EXHIBIT No. 1-B

United States of America

Before the National Labor Relations Board

Twenty-First Region

Case No. XXI-C-1864

In the Matter of

NORTH AMERICAN AVIATION, INC.

and

UNITED AUTOMOBILE, AIRCRAFT AND  
AGRICULTURAL IMPLEMENT WORK-  
ERS OF AMERICA, LOCAL 887, CIO.

COMPLAINT

It having been charged by United Automobile, Aircraft and Agricultural Implement Workers of America, Local 887, CIO, hereinafter called the Union, that North American Aviation, Inc., hereinafter called Respondent, has engaged in and is engaging in, at Los Angeles, California, certain unfair labor practices affecting commerce as set forth and defined in National Labor Relations Act, approved July 5, 1935, 49 Stat. 449, hereinafter referred to as the Act, the National Labor Relations Board, by its Regional Director for its Twenty-first Region, designated as agent of said Board by Article IV, Section 1, subsection (c) and Article II, Section 5, of its Rules and Regulations, Series

2, as amended, hereby issues its Complaint and alleges the following:

1. Respondent is a Delaware corporation, having its principal office and place of business and its principal plant at Inglewood, County of Los Angeles, State of California, and operating other plants in other states of the United States. Respondent is engaged in the manufacture of aircraft and aircraft parts and accessories.

2. Respondent causes, and at all times herein alleged continuously has caused, large quantities and valuable amounts of raw materials used by Respondent in connection with its manufacturing operations at its plant at Inglewood, California, to be transported from points and places outside of the State of California to Respondent's plant at Inglewood, California.

3. Respondent causes, and at all times herein alleged continuously has caused, large quantities and valuable amounts of the aircraft and aircraft parts and accessories manufactured by it at its Inglewood plant to be sold and transported from the Inglewood plant to and through states and territories of the United States other than the State of California, and to foreign countries.

4. United Automobile, Aircraft and Agricultural Implement Workers of America, Local 887, affiliated with the Congress of Industrial Organizations, is, and at all times herein alleged was, a

labor organization within the meaning of Section 2, subsection (5) of the Act.

5. On April 14, 1941, the National Labor Relations Board, pursuant to Section 9 (c) of the Act, certified the Union as the exclusive collective bargaining representative of the production, inspection, timekeeping, production control, storekeeping and maintenance employees of Respondent at its Inglewood, California, plant, including group and working leadmen, excluding office workers, employees of the engineering department, welders, plant police, supervisors, officials who have the right to hire and discharge, and all other supervisory employees, including and above the rank of assistant foremen. Pursuant to Section 9 (a) of the Act, the Union is now, and at all times since April 14, 1941, has been the exclusive representative of all such employees for the purposes of collective bargaining with Respondent with respect to rates of pay, wages, hours of employment and other conditions of employment.

6. On or about July 18, 1941, Respondent entered into a collective bargaining agreement with the Union as such exclusive collective bargaining representative of said employees. A true and correct copy of said agreement is hereunto attached, marked Exhibit "A" and incorporated herein by reference as though fully set forth herein. By said agreement, as appears more particularly in Article V of said Exhibit "A", a procedure was provided for the

settlement and adjustment of any dispute arising between Respondent and employees of Respondent covered by said agreement regarding the interpretation or application of any of the terms of the agreement or any other request or grievance.

7. Respondent by its officers and agents, while engaged as described in paragraphs 1, 2, and 3 hereof, on or about August 12, 1941, distributed to all of its employees within the unit covered by its contract with the Union a notice, a true and correct copy of which is attached hereto, marked Exhibit "B" and incorporated herein by reference as though fully set forth herein, and a copy of said contract, Exhibit "A" attached hereto. Said notice was distributed without consultation with, or notification of the Union, and without the knowledge of the Union. Since August 12, 1941, Respondent has given a copy of said notice and of said contract to each new employee upon his employment. By said notice, Respondent did establish unilaterally a procedure for the settlement and adjustment of disputes or grievances arising between Respondent and employees of Respondent covered by said agreement, Exhibit "A" attached hereto, under which procedure grievances would be handled directly with the employees involved and without the knowledge, consent, or participation of the Union.

8. By its issuance of said notice and its establishment of said procedure, as set forth and described in paragraphs 5, 6, and 7 hereof, Respond-

ent has refused and is refusing to bargain collectively with the Union as the exclusive representative of its employees (as described above) and thereby engaged in and is thereby engaging in unfair labor practices within the meaning of Section 8, subsection (5) of said Act.

9. By its issuance of said notice and its establishment of said procedure, as set forth and described in paragraphs 5, 6, and 7 hereof, Respondent interfered with, restrained and coerced its employees in the exercise of their right to self-organization, to form, join, or assist labor organizations, and to bargain collectively through representatives of their own choosing, and thereby engaged in and is thereby engaging in unfair labor practices within the meaning of Section 8, subsection (1) of said Act.

10. The acts of Respondent, as set forth in paragraphs 5 through 9 hereof, occurring in connection with operations of the Respondent described in paragraphs 1 through 3 hereof, have a close, intimate and substantial relation to commerce, as defined in Section 2 (6) of the Act, and have led, and tend to lead, to labor disputes burdening or obstructing commerce and the free flow of commerce.

11. The acts of Respondent set out in paragraphs 5 through 9 hereof constitute unfair labor practices affecting commerce and the free flow of commerce within the meaning of Section 8, subsec-

tions (1) and (5) and Sections 2(6) and (7) of said Act.

Wherefore, the National Labor Relations Board, on the 15th day of April, 1942, issues its Complaint against North American Aviation, Inc., Respondent herein.

WILLIAM R. WALSH,  
Regional Director  
National Labor Relations  
Board  
Twenty-first Region  
808, U. S. Post Office and  
Court House  
Los Angeles, California

---

## EXHIBIT A

### AGREEMENT

This Agreement entered into by and between North American Aviation, Inc., a corporation, located at Inglewood, California, hereinafter called "the Company," and the United Automobile Workers of America, Local 683, affiliated with the C.I.O., hereinafter called "the Union" as the exclusive bargaining agent acting for and on behalf of the employees of the Company in the unit described hereinafter, evidences the desire of the parties hereto to promote and maintain harmonious



Exhibit A—(Continued)

relations between the Company and its employees and the willingness of the Company to deal with them through the Union as their representatives.

Article I

Duration

(1) This agreement shall become effective upon its acceptance by the Union and the Company, and shall remain in force until the 1st day of July, 1942, and for an additional period of one year thereafter, with the proviso that should either party desire to terminate this agreement or to modify any portion or any of the terms hereof it shall notify the other party in writing not less than thirty (30) days prior to the 1st day of July, 1942, or the end of any subsequent yearly period, that the party giving such notice desires either to terminate the agreement at the end of such yearly period or to negotiate such amendments or changes of the terms or provisions thereof as are specified in such notice.

(2) Negotiations upon such proposed amendments or changes of the terms of this agreement covered in the notices of desire to amend shall begin not later than twenty (20) days prior to the expiration date or the expiration of any subsequent yearly period and shall continue until agreement is reached, and during said negotiations this agreement shall remain in full force and effect, except that during such negotiations subsequent to the expiration date or the expiration of any subsequent yearly period either party, on ten (10) days' notice to the other, may terminate said contract.

**Exhibit A—(Continued)**

(3) This agreement shall be superseded by any legal regulation which is or which may be imposed by any governmental agency to the extent that such regulation is in conflict with any of the terms and provisions of this agreement.

**Article II****Recognition**

(1) The Company recognizes that by virtue of and pursuant to the power vested in the National Labor Relations Board, by Section 9 (c) of the National Labor Relations Act, 49 Stat. 449, and pursuant to Article III, Sections 8 and 9, of National Labor Relations Board Rules and Regulations—Series 2, as amended, it was certified on the 14th day of April, 1941, that International Union, United Automobile Workers of America, Local 683, C.I.O., Aircraft Division, has been designated and selected by a majority of the production, inspection, time-keeping, production control, store keeping, and maintenance employees of North American Aviation, Inc., Inglewood, California, including group and working leadmen, and excluding office workers, employees of the engineering department, welders, plant police, supervisors, officials who have the right to hire, and discharge, and all other supervisory employees including and above the rank of assistant foremen, as their representative for the purposes of collective bargaining, and that pursuant to the provisions of Section 9 (a) of the National Labor

Exhibit A—(Continued)

Relations Act, International Union, United Automobile Workers of America, Local 683, C.I.O., is the exclusive representative of all such employees for the purposes of collective bargaining, with respect to rates of pay, wages, hours of employment and other conditions of employment.

(2) The Company agrees that any present employee who on May 1, 1941, was a member of the Union or who has become a member of the Union since May 1, 1941, shall as a condition of continued employment maintain membership in good standing; and any employee who hereinafter, during the life of this agreement, becomes a member or is reinstated as a member of the union shall as a condition of continued employment maintain membership in good standing.

Article IV

Representation

(1) The Union shall be represented in the plant by one steward for each 250 employees covered by this agreement.

(2) The plant will be districted on each shift by agreement between the union and the management and one steward shall be elected by the members of the union in each district to represent the employees in that district, as provided in the grievance procedure.

(3) Not more than five district stewards on each shift shall constitute the plant grievance committee

## Exhibit A—(Continued)

for that shift, to meet with the management in an effort to settle appeal grievances, as provided in the grievance procedure.

(4) District stewards and members of the plant grievance committee shall be permitted to leave their work after reporting to their respective foremen for the purposes of adjusting grievances in accordance with the grievance procedure, and to attend committee meetings with the management.

(5) No employee shall be eligible to serve as a district steward or a member of the plant grievance committee unless he is an employee and has been an employee for more than six months.

(6) Upon entering a department other than his own in the fulfillment of his duties, district stewards and members of the plant grievance committee shall notify the foreman of that department of his presence and purpose, if he has been sent for, and give the foreman a copy of the written grievance signed by the employee involved.

(7) While on leave of absence, no employee shall serve as a district steward or a member of the plant grievance committee.

(8) District stewards and members of the plant grievance committee are subject to all of the plant rules regarding the conduct of employees on the premises of the Company.

(9) The names of the district stewards and committeemen will be given to the management in writing by the Union and the management will be ad-

**Exhibit A—(Continued)**

vised of any changes in district stewards or committeemen, in writing.

(10) It is understood and agreed that each district steward and committeeman is employed to perform full time productive work for the Company. District stewards and committeemen will be given permission upon request to leave their work during working hours to perform the following duties:

(a) To present to the foreman grievances or disputes which they have been requested by an employee or group of employees to take up with the foreman.

(b) When it is necessary for them to investigate such a grievance or dispute before it can be properly presented to the foreman.

(c) When it is necessary for him to attend, as a member of the plant grievance committee of his shift, a regular or special meeting of such committee.

(d) A suitable form of pass will be provided when stewards or committeemen request permission to leave their work.

**Article V**

**Grievance Procedure**

(1) In the event of any dispute arising regarding the interpretation or application of any of the terms of this agreement or any other request or grievance there shall be no stoppage of work by any em-

## Exhibit A—(Continued)

ployee, and all such matters shall be adjusted according to the following procedure:

(a) Between the aggrieved employee and his foreman or with his representative and his foreman.

(b) Between the district steward and the factory manager or his authorized representative.

(c) Between the plant grievance committee of the shift and the works manager or his authorized representative on that shift.

(2) No case will be appealed from one of the above steps to the next higher step until after twenty-four (24) hours. The plant grievance committee on each shift shall consist of not more than five (5) district stewards on such shift, one of whom shall be the chairman and all of whom shall be employees of the Company, whose names have been given to the management in writing by the president of the local Union.

Meetings of the management and the plant grievance committee shall be scheduled weekly on the respective shifts. Emergency meetings may be arranged by mutual agreement.

In the event of failure by the Union to appeal any decision of a grievance, given at one step of the grievance procedure within five (5) working days of such decision, the case shall be considered closed on the basis of the decision so given.

There is no responsibility on the Company to

Exhibit A—(Continued)

make an adjustment in any case unless presented within three (3) days of its occurrence.

(3) If any case is not satisfactorily adjusted by the plant grievance committee on the shift on which the grievance arose, with the management's representative of that shift, it may be appealed to the general manager or his authorized representative, and the grievance committee, within forty-eight (48) hours of such written appeal. The general manager or his representative will render his decision in writing to the chairman of the grievance committee within forty-eight (48) hours after the meeting with the committee if the decision was not given at the meeting.

(4) Any of the periods within which any of the acts required in this section are to be performed may be extended by mutual consent of the parties. In computing the time within which the acts herein are required to be performed Saturdays, Sundays and holidays shall be excluded.

(5) Minutes of the meetings between the grievance committee and the management will be kept and copies of the minutes prepared by the management will be submitted to the Union. After the minutes have been accepted by both parties, copies will be initialed by both parties for their permanent records.

(6) The Company agrees that the grievance committee and the district stewards shall not be hindered, coerced, restrained, or interfered with in the

**Exhibit A—(Continued)**

performance of their duties of investigating, presenting and adjusting grievances or disputes, which duties shall be conducted on Company time. It is understood and agreed that each grievance committeeman has full time productive work to perform and that he will not leave his work during working hours except when necessary to perform his duties as herein defined. It is further understood and agreed by the parties hereto that each will cooperate with the other in reducing to a minimum the actual time spent by the district stewards and members of the grievance committee in investigating, presenting and adjusting grievances or disputes. If the grievance committee finds it necessary to make an investigation in order to properly present a grievance or dispute to the management, the respective members shall be granted upon request permission to leave their work for this purpose, by their respective foremen or supervisors. They shall report to the foreman or supervisor the general nature of the grievance which they are to investigate and again report to him upon their return to work in the department.

(7) If any employee be discharged for any reason he shall be given the opportunity to present to his district steward his grievance before leaving the plant.

(8) In cases of disciplinary layoff or discharge of employees for infraction of shop rules or other misconduct which merits discipline, the Union reserves the right to seek modification or elimination



Exhibit A—(Continued)

of such penalty and compensation in whole or in part for lost wages on the ground that the employee was wrongfully disciplined or that the penalty was too severe for the offense involved, and such protest shall be handled according to the grievance procedure including the right of appeal to arbitration as provided in Article VI.

(9) In the event the Company has any grievance against the Union for failure to abide by the terms and conditions of this agreement, the grievance shall be presented to the grievance committee provided for herein, and shall be subject to negotiations in accordance herewith.

(10) No provision of this Article shall be interpreted to prevent any employees or group of employees from presenting grievances to the management in accordance with the provisions of Section 9 (a) of the National Labor Relations Act.

Article VI

Board of Arbitration

(1) If a grievance or dispute with respect to the interpretation or application of any of the terms of this Agreement is not satisfactorily settled, either party to this contract shall request that the matter be submitted for settlement to arbitration. If such request is made, the other party shall also agree to submit the matter to arbitration, and it is understood and agreed that the decision of the Arbitration Board, as provided for in this Article, shall be

## Exhibit A—(Continued)

final and binding upon both parties, and therefore it is agreed that during the term of this Agreement the Union or its members shall not call or engage in, sanction, or assist in, any sympathy or other strike against, or any slow-down or stoppage of work, of the Company, and the Union will require its members to perform their services for the Company when required by the Company to do so, and during the term of this Agreement the Company shall not cause or permit any lockout of the members of the Union.

(2) The Arbitration Board shall consist of three persons, one chosen by the Union and one chosen by the Company and a third to be chosen by these two. No member of the Board shall have any official, financial or other connection with or interest in either the Company or the Union and its affiliates. The Company and the Union shall submit to each other the names of their respective representatives, and the two shall meet to choose the third member of said Arbitration Board thirty-six (36) hours after the request for arbitration has been made. If the Company and the Union representatives cannot agree within seventy-two (72) hours on a person to act as the third member of said Board, the Company and Union representatives shall request Dr. John R. Steelman, Director of the Division of Conciliation, Department of Labor, to submit a list of five persons qualified to act as the third member of said Arbitration Board. The Union rep-

Exhibit A—(Continued)

representative and the Company representative, after the receipt of said list, shall each have the right to strike two names from it in the following manner: The two representatives shall determine by lot the order of elimination, and thereafter each shall in that order alternately eliminate one name until only one remains, the fifth or remaining name shall thereupon be accepted by both the Union and the Company as the third member of said Board. Said Arbitration Board shall thereafter meet as soon as possible to hear and adjust said grievance or dispute. Said Board shall render its decision in writing not later than five (5) days after it has taken the matter under submission.

(3) The compensation and expense of the third member of said Board shall be borne equally by the Company and the Union.

(4) No grievance or dispute shall be presented for arbitration until either the Company or the Union has availed itself of the full procedure set forth in Article V hereof and all grievances or disputes shall be considered finally settled and not subject to arbitration unless within fifteen (15) working days from the date of receipt by the Union of the decision of the management as specified in Article V, sub-section 3, the Union shall request in writing that the grievance or dispute be submitted to arbitration.

(5) Before the submission of a grievance or dispute to arbitration, the Company and the Union

## Exhibit A—(Continued)

shall set forth in writing specifically the issue or issues to be submitted to arbitration, and the Arbitration Board shall confine its decision to such stipulation of issue or issues.

(6) It is understood that the Arbitration Board shall use every means to expeditiously present, consider, and decide any and all matters submitted as herein provided, and the Company and the Union agree to facilitate the deliberations of said Board in every way possible. Said Board may call any employee as a witness in any proceeding before it, and the Company agrees to release said witness from work if he is on duty. If an employee witness is called by the Company, the Company will reimburse him for the time lost.

## Article VII

## Management Prerogatives

The right to hire, promote, discharge or discipline for cause, and to maintain discipline and efficiency of employees, is the sole responsibility of the Company except that Union members shall not be discriminated against as such. Any employee who feels aggrieved by any Company action in this respect has recourse through the grievance procedure set forth in this agreement for the adjustment of the grievance. It is recognized that the type of products to be manufactured, the location of plants, the schedules of production, the methods, processes and means of manufacturing, etc., are management prerogatives.

Exhibit A—(Continued)

Article IX

International Representative

The duly accredited International Representative shall be permitted to attend meetings of the plant grievance committee and the management, upon request of the management. In grievances appealed to the plant grievance committee in which the International Representative must actually observe the operations about which the dispute has arisen, during working hours, in order to understand the case, he will be permitted to enter the plant to make such observations, in accordance with the Army, Navy and Company rules respecting plant visitors.

Article XII

Qualifications

Each of the parties hereto warrants that it is under no disability of any kind that will prevent it from completely carrying out and performing each and all of the provisions of this Agreement, and further that it will not take any action of any kind that will prevent or impede it in the complete performance of each and every provision hereof. This agreement contains all of the covenants, stipulations, and provisions agreed upon by the parties hereto, and no representative of either party has authority to make, and none of the parties shall be bound by, any statement, representation, or agreement not set forth herein. No violation or breach

## Exhibit A—(Continued)

of this agreement shall be claimed by either party hereto without giving notice in writing to the other and allowing ten (10) days to such other party for redress or correction.

## Article XIII

## Safety

(3) No employee shall be discharged for refusing to work on a job if his refusal is based upon the claim that said job is not safe or might unduly endanger his health, until the dispute has been adjusted according to the grievance procedure set forth in Article V of this Agreement.

## Article XIX

## Specific Performance

Either party hereto shall be entitled to require specific performance of the provisions of this Agreement.

## Article XX

## Seniority

(5) The Company will maintain a complete seniority list, copies of which shall be furnished the Union. Any claimed errors in the seniority list may be reported to the Company regularly through the grievance procedure.

Exhibit A—(Continued)

Article XXVI

Leaves of Absence

(3) If the Company shall refuse an employee leave of absence the employee may then avail himself of the grievance procedure contained in this Agreement.

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EXHIBIT "B"

INFORMATION FOR EMPLOYEES

GRIEVANCE PROCEDURE

In accordance with the National Labor Relations Act and the policy of North American Aviation, Inc., every employee has the privilege of presenting his grievance directly to the Management.

In order that this procedure may be known to employees, the following steps are outlined:

1. Employees must first take up the matter with their Foreman. If a satisfactory settlement is not *reach*, the employee may request the presence of a member of the Industrial Relations Department who will help in attempting to adjust the matter.

2. If the complaint is not adjusted satisfactorily, a member of the Industrial Relations Department will arrange a hearing with the Works Manager or his representative.

3. Should the decision of the Works Man-

ager not be satisfactory to the employee, he may, if he so desires, present a written appeal to the President of the Company. The Industrial Relations Department will assist the employee in arranging for the presentation of his case.

4. Should the decision of the President not be satisfactory, and the employee so desires, the matter may be submitted to outside arbitration in a manner mutually acceptable to both the employee and the Company.

The Industrial Relations Staff is available to all employees who may desire information or assistance with respect to their rights or privileges under either company policy or collective bargaining. Employees desiring to contact the Industrial Relations Department may call at the following hours Monday through Friday:

First Shift—At the conclusion of the shift.

Second Shift—Before the shift starts work.

Third Shift—Third shift employees shall ask their Foreman to make arrangements for an appointment. Such matters will receive prompt attention.

NORTH AMERICAN AVIA-  
TION, INC.

J. H. KINDELBERGER  
President.



BOARD'S EXHIBIT No. 1-C

[Title of Board and Cause.]

ANSWER OF RESPONDENT NORTH  
AMERICAN AVIATION, INC.

Comes Now, North American Aviation, Inc., respondent in the above entitled matter, and in answer to the complaint filed against it herein, affirms and denies as follows:

1. In answer to paragraph 6 of said complaint, respondent admits the allegations thereof and that in the agreement referred to in said paragraph and attached to the complaint as Exhibit A a procedure was provided for the settlement and adjustment of any dispute arising between respondent and employees of respondent covered by said agreement regarding the interpretation or application of any of the terms of the agreement, or any other request or grievance, and in this connection respondent alleges that by the terms of paragraph (10) of Article V of said agreement it was agreed between the union and respondent that any individual employee of respondent or group of employees should have the right at any time to present grievances to respondent for adjustment and settlement.

2. In answer to paragraph 7 of said complaint, respondent denies that it in any manner, shape or form established unilaterally, or in any other manner, a procedure for the settlement or adjust-

ment of disputes or grievances arising between respondent and the employees of respondent covered by the agreement set forth as a portion of the complaint and denominated Exhibit A, or arising between respondent and any of its employees; but in this connection respondent alleges that by the terms of paragraph (10) of Article V of said Exhibit A attached to said complaint, the respondent and the union agreed after negotiation that individual employees or groups of employees of respondent should have the right to present grievances to said respondent for adjustment without the knowledge, consent or participation of the union.

3. In answer to paragraph 8 of said complaint, respondent denies each and every allegation contained in said paragraph, and each and every part of each thereof, and further specifically denies that it established any procedure whatsoever, whether as set forth in said complaint or otherwise, or that by the issuance of any notice or the following of any procedure referred to in the complaint the respondent has refused at any time, or is refusing, to bargain collectively with the union as the exclusive representative of its employees, or thereby or in any manner has engaged in or is engaging in any unfair labor practice of any kind or character within the meaning of Section 8, subsection (5) of the Act referred to in the said complaint.

4. In answer to paragraph 9 of said complaint, respondent denies each and every allegation con-

tained in said paragraph, and each and every part of each thereof, and further specifically denies that it established any procedure whatsoever, whether as set forth in said complaint or otherwise, or that by the issuance of the said notice or the following of any procedure of any kind or character, whether as set forth in said complaint or otherwise, the respondent interfered with or restrained or coerced its employees in the exercise of their right to self-organization, to form or join or assist labor organizations or to bargain collectively through representatives of their own choosing, or that it thereby or in any manner set forth in said complaint engaged in or is engaging in unfair labor practices within the meaning of Section 8, subsection (1) of the Act referred to in said complaint.

5. In answer to paragraph 10 of said complaint the respondent admits that any acts of respondent occurring in connection with the operations of the respondent described in paragraphs 1 through 3 of said complaint have a close, intimate and substantial relation to commerce, as defined in Section 2, subsection (6) of the Act; with this exception respondent denies each and every allegation contained in the said paragraph and each and every part of each thereof, and further specifically denies that any acts of the respondent as set forth in said complaint have led to, or tend to lead to, labor disputes burdening or obstructing commerce or the free flow of commerce; and in this connection respondent alleges that under the terms and pro-

visions of the labor agreement between respondent and the union, attached to said complaint as Exhibit A, and specifically Articles V and VI thereof, no dispute between respondent and its employees or the union could lead or tend to lead to a labor dispute that would burden or obstruct commerce or the free flow thereof. Respondent further alleges in this connection that the union has never at any time presented to respondent any complaint with respect to the posting of the notice attached to said complaint as Exhibit B for adjustment according to the terms and provisions of Articles V and VI of said agreement attached to the complaint as Exhibit A.

6. In answer to paragraph 11 of said complaint respondent denies each and every allegation set forth in said paragraph, and each and every part of each thereof, and further specifically denies that any acts of the respondent referred to in the said complaint constitute unfair labor practice or practices affecting commerce or the free flow thereof within the meaning of Section 8, subsections (1) or (5), or Section 2, subsections (6) and (7) of the said Act, or within any meaning whatsoever.

Wherefore, respondent asks that the complaint of the National Labor Relations Board issued on the 15th day of April, 1942, in this matter be dismissed.

**J. STUART NEARY**

of Gibson, Dunn & Crutcher  
Attorneys for Respondent  
North American Aviation,  
Inc.

BOARD'S EXHIBIT No. 2

[Title of Board and Cause.]

STIPULATION

It Is Hereby Stipulated between North American Aviation, Inc., Respondent herein, by Gibson, Dunn & Crutcher, its attorneys, and John Paul Jennings, Attorney, National Labor Relations Board, as follows:

1. North American Aviation, Inc., hereinafter called the Respondent, is a Delaware corporation, with its principal office and place of business at Inglewood, County of Los Angeles, State of California, where Respondent owns and operates a plant, herein called the Inglewood plant. Respondent is engaged at the Inglewood plant in the manufacture of aircraft and aircraft parts and accessories.

2. North American Aviation, Inc., of Texas, is a wholly owned subsidiary of Respondent, which operates a plant for the manufacture of aircraft and aircraft parts and accessories at Dallas, Texas. North American Aviation, Inc., of Kansas, is a wholly owned subsidiary of Respondent, which operates a plant for the manufacture of aircraft and aircraft parts and accessories at Kansas City, Kansas.

3. During the calendar year 1941, Respondent purchased raw materials used by it in connection

with its manufacturing operations at its Inglewood plant of a total value in excess of \$17,000,000, of which raw materials to the value in excess of \$15,300,000 were transported to the Inglewood plant from points and places outside of the State of California.

4. During the calendar year 1941, Respondent sold aircraft and aircraft parts and accessories manufactured by it for a sum in excess of \$69,500,000. Products of the Inglewood plant, as above specified, sold for a sum in excess of \$62,550,000, were transported from the Inglewood plant to States of the United States other than the State of California and to foreign countries.

5. For the purposes of this proceeding, Respondent admits that its operations affect commerce within the meaning of Sections 2 (6) and (7) of the National Labor Relations Act.

Dated: This 27th day of April, 1942.

NORTH AMERICAN AVIA-  
TION, INC.

By GIBSON, DUNN & CRUTCHER

Its Attorneys

J. STUART NEARY

JOHN PAUL JENNINGS

Attorney, National Labor Re-  
lations Board

TRANSCRIPT OF ORAL TESTIMONY BEFORE NATIONAL LABOR RELATIONS BOARD ON JULY 14, 1942.

Mr. Reilly: Now, what are the typical kind of grievances brought up by this machinery, sir?

Mr. Neary: There isn't any evidence in the record that any of them were brought up. There were only two that we handled over 800 of the other procedure, but the Examiner refused the offer of proof. The Board's attorney objected to it.

Dr. Leiserson: Let us look at your notice No. 4. If the employee is not satisfied, the matter may be submitted to outside arbitration in a manner mutually acceptable to both employee and the company.

Now, the law gives the employee the right to take up grievances with the Management, and the Management may—the provision of the Act gives the Management the right to bargain individually with an employee about how a dispute will be arbitrated and if it does, this obviously—obviously this manner of setting up arbitration and whether they agree on arbitration or not, in the process of bargaining—if you do it with a union and set up an Arbitration Board, all right, or you can do it as contact with an individual in a manner satisfactory to both, and that means you have to bargain about the procedure you do set up, by such a Board,—and when that Board makes a decision in the type of grievance that is contrary to a decision made under the exclusive agreement—you take the Act

when it said the employee may go to the employer and present his grievance, give the employer the authority to set up all of this duplicate machinery and bargain with each individual about an arbitration Board?

Mr. Neary: I don't pretend that. The only provision here in paragraph 4 of this is not to bargain—as to whether it shall go to arbitration, but simply a means that if the methodical detail——

Dr. Leiserson (Interposing): In a manner mutually accepted—what does that mean? If that isn't bargaining, what is it? Not acceptable to nobody—and if it is acceptable, there is a bargaining.

Mr. Neary: That is right; I am not denying that, but there isn't any question but what it is necessary—it is important that they are given the right to present grievances, that they have the right to settle those grievances.

The right to present grievances is the right.

The Chairman: Would you say that you have the right to settle those grievances outside of the confines of the joint agreement?

Mr. Neary: Out of line?

The Chairman: Yes.

Mr. Neary: Why, no. My contention is that the Trial Examiner's contention with respect to the matter, the construction of Section 9, and the union's contention, and the Board's contention, at the times of the hearing, is wrong.

I don't think that when you are settling a grievance, you are bargaining at all. You are not. And



you certainly are not bargaining collectively, even though you settle a grievance with the Union, because a grievance is a settlement of an individual grievance in the—and it is supposed to be settled according to certain standards which have been preliminarily set up, the standards of the contract.

The Chairman: Now, take a case that might come up.

You have a grievance for seniority. You have a seniority basis, kept up with the employees, and which the union has the right to protect.

Now, suppose some individual employee or group of employees raise some question and make use of this machinery. How can you dispose of such a grievance because if these fellows—if something went wrong, that means taking something away from somebody else, because seniority means superior and inferior rights and the——

Mr. Neary (Interposing): Seniority always means that any contract—according to a definite pattern,——

Dr. Leiserson (Interposing): But the pattern would mean—it would be the agreement with the exclusive bargaining unit.

The Chairman: Yes.

Dr. Leiserson: All right, but how would the union that has that exclusive agreement know when you are separating the thing, as you call it, with the individual under this procedure, or where it is undertaken under this procedure, how would the union know about it?

Mr. Neary: Well, as a practical matter, you know as well as I do that in a shop where, for instance, seniority provisions prevail and I am being hurt by your advancement of your claim for certain advancement over me that it gets to be pretty generally known, I am not worried about the practical difficulties.

Dr. Leiserson: Well, you might make an agreement to give one fellow—move him up three points, you might agree to move him up three points on the seniority list. Obviously the union would have to know about that.

But take an example that involves wages where you have certain provisions with respect to wages. A man has a grievance. You say the standard is your collective agreement. He goes to the employer and the employer under this arbitration procedure, fixes the wage with him alone——

Mr. Neary: That is right.

Dr. Leiserson: ——that is outside the union—the union doesn't know whether you are undermining the agreement or paying more than the agreement. Now, how can you—wouldn't that be individually bargaining with respect to a rate of pay, if that settlement was not in line with the settlement of similar grievances under the collective bargaining agreement?

Mr. Neary: It would not be bargaining. It would be a violation of the contract in point, and that is what you are assuming when you are assuming all of these facts.

Dr. Leiserson: Wouldn't it be a violation of the agreement to settle an individual complaint with an individual that involved standards set up by the exclusive representative without consulting that exclusive representative as to those standards?

Mr. Neary: Well, now, as a practical matter, it may be desirable—the basic right is their's. It may be desirable that a different form of notice or provision be made for the notification of the union to give them the right to—as a matter of fact, about any dispute that has been settled individually, as contrary to the rights that they have under the contract.

I insist, gentlemen, that that is not an issue in this case; nothing about the form of the procedure here at all. The question solely is the right to issue a notice and establish a procedure. The question is the interpretation of Section 9 (a), the fundamental right of an employee to present a grievance individually.

The Chairman: Well, won't that turn upon the nature of what you are trying to do?

Mr. Neary: No. As a matter of fact, that is one reason that I am here.

The Chairman: They don't have an abstract right.

Mr. Neary: I don't know what they have done, if it isn't an abstract right, and a practical one, under the terms of the National Labor Relations Act. It is an abstract right and certainly if it can't be exercised, then it isn't worth anything, but it——

The Chairman (Interposing): Well, properly exercised—proper or improper, you have got to decide upon the basis of what is done. If you are just pressing upon collective bargaining, then it is wrong, is it not?

Mr. Neary: Well, I am willing to go to issue on those points. As a matter of fact, I attempted to introduce into the record in this case the effort on the part of North American to redraft this notice after I had discussions with your Regional Director of the 21st Region, and discussions with the union representatives through the grievance procedure to redraft this notice to conform to the criticisms that had previously been made.

We were perfectly willing to do that. There was no question with respect to that, and we were never requested to do so by the union.

Dr. Leiserson: Well, I wonder whether the mistake you are making isn't this: There isn't any question that under the proviso, or you take the section—the Act is intended to set up collective bargaining, one representative for all the employees, whether they want the union or not, for——

Mr. Neary: For the purposes of collective bargaining.

Dr. Leiserson: —for the purpose of collective bargaining. All right. Now, in that collective bargaining agreement there is set up machinery for administering the bargaining and that includes grievance machinery. O. K.

Now, knowing that, Congress said nothing in this

to prevent the employee to go to the employer and present, if he has got it, grievances. That correlatively means there is nothing in the Act to prevent the employer from fixing up the grievance with him, provided, of course, he doesn't violate the Act, but does that mean that the presentation of grievance gives the employer the right to go beyond fixing the grievance and setting up machinery including arbitration as if he were paralleling the collective bargaining agreement or machinery. That is the issue here.

You can fix up any grievance and you can let him go to the highest operating officer, I suppose, to fix the grievance up, but for you to say "I will take up with each individual"—you would have a dozen arbitration boards or you might have a dozen arbitration boards as mutually agreeable between individual employees and me, and then we'll parallel all of that what becomes—we'll parallel all of that arbitration machinery and what becomes of the exclusive representation under those circumstances?

Mr. Neary: I don't think it interferes with the exclusive representation at all. As a matter of fact, it is entirely possible to have three or four decisions respecting the same issue under any grievance procedure or arbitration procedure you might set up.

There might be a grievance today with respect to the interpretation of well, maintenance in union membership; we have had an arbitration on that, and we have the decision of an arbiter and an arbitration board setting forth the rules and regula-

tions by which we shall determine whether or not a person was a member of the union.

Well, tomorrow we might have another one, and another and different arbitration board may, under a different set of fact, following generally the same principles in the contract, set up different standards with respect to each individual in the case.

But I don't think that because Courts will render different decisions with different sets of facts, that you are changing——

Dr. Leiserson: Now, wait a minute. You are dealing with the union and you—if you deal with the union and you gather decisions on setting the standard for determining whether a fellow was a member of the union, and you got one decision, that binds you in your relationship with the union for all the employees covered by that agreement,——

Mr. Neary (Interposing): For the purposes of collective bargaining.

Dr. Leiserson: For the purposes of collective bargaining.

Mr. Neary: With respect to wages, hours and working conditions.

Dr. Leiserson: I know, but it binds you for all of the employees covered by that agreement, otherwise there is no exclusive agreement.

Now, it is conceivable that under the same machinery, that a later judge or the same judge might revise his opinion and make it less binding on you and the union for all the employees in the bargaining unit—there can be no discrimination.

Now, then, if you have a decision from one Board covering all employees in the bargaining unit and then another Board comes along not acting in the collective bargaining relationship with the union, and it makes a decision different from the one made under the union agreement obviously that is setting up complicating machinery that purports to say to the individual employee "regardless of the fact that you are covered by this agreement and bound by all the arbitration machinery, I, the employer, can set up another arbitration Board," and if, perchance he wants to make a different decision, we are not bound by it.

Mr. Neary: Well, I must answer two points there.

In the first place, I do not think under the National Labor Relations Act nor under the terms of our agreement, that all employees are bound by the arbitration or grievance procedure.

Dr. Leiserson: Well, that is a problematical question,——

Mr. Neary: That's right.

Dr. Leiserson: ——as to what is collective bargaining. You would—you agreed that every person in the unit is represented by the union and covered by the agreement; there is no question about that.

Mr. Neary: For the purpose of collective bargaining.

Dr. Leiserson: By whatever the agreement said.

Mr. Neary: That is right; by the terms of the agreement. If the terms of the agreement, even

though they made the agreement's procedure the exclusive machinery, I say that under the Act individual employees may present grievances to the employer, and present isn't——

Dr. Leiserson: He can fix them, but he can't violate his bargaining agreement.

Mr. Neary: I agree with that.

Now, as to the second point: Suppose that we come through with this grievance, this individual grievance and go to arbitration and the arbiter decides that this individual's right, under the terms of this agreement and the facts in the particular case. Now, that arbitration is not binding upon the union. It is binding only on the company with respect to an individual, to that individual.

Dr. Leiserson: All right. Now, with your collective bargaining agreement, the exclusive representative has set up arbitration machinery, hasn't he? —to arbitration. That covers all of the employees in the bargaining unit. Now, you take the position that in spite of the Act the provision that an individual employee may present a grievance to the employer; that gives the employer the right to set up other arbitration machinery for other—for the same employees that are covered by the exclusive agreement.

That's what you expect.

Mr. Neary: For individual grievances, but not as to—I don't understand that it has the right to interrupt the procedure of the——

The Chairman (Interposing): Would you say



that the—you have an arbitration case bringing out one of these individual grievances that they arbitrated and ruled differently from what an arbitrator has—in the agreement?

Mr. Neary: It is entirely conceivable.

The Chairman: Well, what effect has it, then? What is binding about it?

Mr. Neary: The binding effect would only be on the company with respect to the——

The Chairman (Interposing): There you have an agreement which requires—you have differences which the—the binding——

Mr. Neary (Interposing): The effect would only be on the company.

The Chairman: You have an agreement which requires—you have differences—that agreement is binding on all parties. You have certain standards and then you try to get other standards—Now, I can see that it is quite possible for any individual to try to get his grievance settled in accordance with any agreement—if you are going to put it up to an arbitrator and have that arbitrator interpret that agreement in such a way—that is his business and——

Mr. Neary: I want to try to answer your question. You are assuming for the purpose of argument, that it may be possible for an individual to present individual grievances to his employer and the grievance to be attested to by the employer up to the point of arbitration, but that beyond that the employer may not go with the individual griev-

ance and may not set up a separate arbitration Board to determine any of these rights, under the provisions of this agreement.

Dr. Leiserson: Then you require joint bargaining different from the agreement. That employee is within the bargaining unit. Now, he can go to the employers and the employers tell him, now the standard set here by this exclusive agreement, what is decided by my joint committee and the other, plus arbitration, under the agreement I will give you—and that's all he can say.

Mr. Neary: I see what you mean. I think perhaps we are in agreement on that. I don't think that even under union arbitration that if you have an arbitration setting forth an interpretation of some basic agreement of some sort, that the employer has any right in the future thereafter to settle by arbitration.

Those interpretations are determinations under the basic agreement—I think the individual grievances in taking them up the employer should be bound not only by the basic agreement that is negotiated, but also by any decisions rendered in union grievance committees with respect to the same issues.

Now, any violation of that I consider would clearly be a violation of the——

The Chairman: Or any issue which involves the interpretation of the collective agreement.

Mr. Neary: Well, your position then is that any time an individual——

(Discussion)

Mr. Neary: Then your question is that any issue that may be raised by an individual which involves interpretation of the basic agreement with respect to his rights must be decided only in a grievance procedure, only where the grievance procedure and the contract, the arbitration procedure and the contract, through the——

The Chairman (Interposing): The interpretation of the——

Dr. Leiserson (Interposing): You have an agreement with an exclusive representative for all of the employees in the whole plant. And you have written it out, and you have provisions in it for interpreting and applying that agreement, that this provision in the Act which says an employee may present an individual grievance, that gives you the right to arrange with that employee to get an independent interpretation of your agreement not with the individual employee for you can't make an agreement with him, but to get from a third party, without consulting the union, an interpretation of an agreement that you made with the union.

Mr. Neary: Yes. Now, I think this matter has been decided by Certain Courts of Appeal. I think in the matter of National Labor Relations Board vs. Union Pacific Stage the Court there clearly held the adjustment of individual grievances directly between employee and employer and such pro-

cedure—the Act does not prohibit the adjustment of individual grievances directly between employee and employer and such procedure is entirely consistent with collective bargaining in matters affecting the employees of the plant.

Now, I think that is where we are——

Dr. Leiserson (Interposing): That is perfectly true, but not duplicating machinery. The adjustment of the grievance is one thing, but duplicating machinery is another.

Mr. Neary: The point, Dr. Leiserson, is this: We have 18,000 employees just in this one plant. If individuals have the right to present grievances, and we have corresponding duties to adjust them, we must have some procedure because there is too great a possibility for the things you are pointing out here—for discrimination to arise in the interpretation of the terms of the agreement.

What we want more than anything else is uniformity in the interpretation of the terms of the agreement and in settling these grievances. We therefore must have a procedure and we consider that the procedure ought to be uniform or parallel to the set-up in the contract so that there will not be any discrimination or favoritism one way or the other.

Dr. Leiserson: With whom do you make that procedure? You can make procedure for your own people,——

Mr. Neary: That's all.

Dr. Leiserson: ——and for your own Manage-

ment, but you haven't any right to bargain about procedure with any individuals.

Mr. Neary: All we have done is no bargaining at all.

We simply set forth in this notice the statement that if you desire to present a grievance individually without representation by the union, this is the only procedure by which we will handle it.

Dr. Leiserson: You think the Act permits you, as an employer to say to employees who have an exclusive agreement and who have been bound by an election, "Here, I want to encourage you to come to this machinery that I am setting up, and that's why I am making full parallel machinery to the rest so that you don't have to go through the union machinery; I'll provide you with a substitute."

You think that was contemplated under the Act?

Mr. Neary: I think that the citation of cases, and particularly the ones which we filed in supplemental brief, I think are indicative of an invitation to come in and work with us,—Midland Steel Products Company vs. National Labor Relations Board, 113 Fed. (2d).

I think that it is necessary not that we—I misstated myself there—Not that we asked these people to come in and don't use the other grievance procedure; I don't want the Board to get that impression, or think that we have the right—I think we have the right and I think it is our duty in order to avoid discrimination and in order to avoid the possibility of discrimination and to make everything

public, I think we have the duty to set forth publicly the procedure by which we will handle individual grievances, if we do.

Now, as a matter of fact, under the provisions of the notice, the fact is that two grievances have been handled in that manner, and 800 some odd have been handled by the other method, and the statement of the Trial Examiner that we have not bargained collectively and have refused to bargain collectively, seems to me a little bit ludicrous when you take into consideration that we have been bargaining for the last three weeks and had some fifty odd issues settled under the new contract and are about to come to the War Labor Board with the others.

Now, I want to again impress this if I may have just a second—upon the Board, that I see this issue to be, as the Trial Examiner does, and as all the parties do, the interpretation of section 9 (a) and the proviso in the subsection. I think it is highly important that it be given by the Board a clear—to the employer and employees as well, to give a clear statement with respect to the rights and direction as to what they should do.

But I contend that the Act itself provides that we individuals have the right to present grievances and we have the corresponding duty to listen and to adjust grievances, which adjustment even goes to arbitration. I don't see how else it can be, and I think our Courts have interpreted that section and have had it up for consideration a number of

times and have had, in each case, said exactly what subsection 9 says itself, the difference between collective bargaining with respect to rates, wages and hours and working conditions and the determination and adjustment of an individual grievance.

You are not affecting collective bargaining or the collective bargaining rights of the majority group when you are determining an individual grievance. It has nothing to do with it. The procedure here is not inconsistent with collective bargaining and the collective bargaining rights of individuals.

Thank you.

The Chairman (Interposing): It doesn't say that nothing beyond the presentation shall happen.

Mr. Kaplan: We believe that the statement contained in the House report answers that rather clearly. It is a one sentence statement that reads——

The Chairman (Interposing): What is the sentence?

Mr. Kaplan: It provides in section 9 (a), expressly stated, that any employee or group of employees shall have the right at any time to present grievances to employers, and the majority rule does not preclude adjustment in individual cases outside the scope of the basic agreement.

In other words, that is outside of wages, hours and other conditions of employment.

The Chairman: Interpreting that, it is for the purpose of presenting for adjustment certain types of grievances; is that your point?

public, I think we have the duty to set forth publicly the procedure by which we will handle individual grievances, if we do.

Now, as a matter of fact, under the provisions of the notice, the fact is that two grievances have been handled in that manner, and 800 some odd have been handled by the other method, and the statement of the Trial Examiner that we have not bargained collectively and have refused to bargain collectively, seems to me a little bit ludicrous when you take into consideration that we have been bargaining for the last three weeks and had some fifty odd issues settled under the new contract and are about to come to the War Labor Board with the others.

Now, I want to again impress this if I may have just a second—upon the Board, that I see this issue to be, as the Trial Examiner does, and as all the parties do, the interpretation of section 9 (a) and the proviso in the subsection. I think it is highly important that it be given by the Board a clear—to the employer and employees as well, to give a clear statement with respect to the rights and direction as to what they should do.

But I contend that the Act itself provides that we individuals have the right to present grievances and we have the corresponding duty to listen and to adjust grievances, which adjustment even goes to arbitration. I don't see how else it can be, and I think our Courts have interpreted that section and have had it up for consideration a number of



times and have had, in each case, said exactly what subsection 9 says itself, the difference between collective bargaining with respect to rates, wages and hours and working conditions and the determination and adjustment of an individual grievance.

You are not affecting collective bargaining or the collective bargaining rights of the majority group when you are determining an individual grievance. It has nothing to do with it. The procedure here is not inconsistent with collective bargaining and the collective bargaining rights of individuals.

Thank you.

The Chairman (Interposing): It doesn't say that nothing beyond the presentation shall happen.

Mr. Kaplan: We believe that the statement contained in the House report answers that rather clearly. It is a one sentence statement that reads——

The Chairman (Interposing): What is the sentence?

Mr. Kaplan: It provides in section 9 (a), expressly stated, that any employee or group of employees shall have the right at any time to present grievances to employers, and the majority rule does not preclude adjustment in individual cases outside the scope of the basic agreement.

In other words, that is outside of wages, hours and other conditions of employment.

The Chairman: Interpreting that, it is for the purpose of presenting for adjustment certain types of grievances; is that your point?

Mr. Kaplan: The point is that they are outside the scope.

The Chairman: The limitation is there, outside the scope of the——

Mr. Kaplan: Yes, we have no argument on that principle.

The Chairman: Yes. You couldn't do anything more than present them; no obligation.

Mr. Kaplan: No; we are not contending that matters outside the scope of our jurisdiction can't be adjusted, but that matters which are adjusted which are within the scope of wages, hours and working conditions directly affect the union and will undermine its authority in the plant.

United States of America  
Before the National Labor Relations Board

Case No. C-2198

In the Matter of

NORTH AMERICAN AVIATION, INC.

and

UNITED AUTOMOBILE, AIRCRAFT and  
AGRICULTURAL IMPLEMENT WORK-  
ERS OF AMERICA, LOCAL 887, C. I. O.

Mr. John Paul Jennings,  
for the Board.

Gibson, Dunn & Crutcher,

by Mr. J. Stuart Neary  
and Mr. J. H. Peckham,  
of Los Angeles, Calif.,  
for the respondent.

Gallagher & Wirin,  
by Mr. Victor Kaplan,  
of Los Angeles, Calif.,  
for the Union.

Miss Grace McEldowney,  
of counsel to the Board.

## DECISION AND ORDER

### Statement of the Case

Upon an amended charge duly filed by United Automobile, Aircraft and Agricultural Implement Workers of America, Local 887, C. I. O., herein

called the Union, the National Labor Relations Board, herein called the Board, by the Regional Director for the Twenty-first Region (Los Angeles, California), issued its complaint dated April 15, 1942, against North American Aviation, Inc., Inglewood, California, herein called the respondent, alleging that the respondent had engaged in and was engaging in unfair labor practices affecting commerce, within the meaning of Section 8 (1) and (5) and Section 2 (6) and (7) of the National Labor Relations Act, 49 Stat. 449, herein called the Act. Copies of the complaint, accompanied by notice of hearing, were duly served upon the respondent and the Union.

With respect to the unfair labor practices, the complaint alleged, in substance: (1) that on or about August 12, 1941, at a time when there existed, between the respondent and the Union, a collective bargaining agreement recognizing the Union as the exclusive bargaining representative of the respondent's employees in a unit previously found by the Board to be appropriate and providing a procedure for the settlement and adjustment of disputes arising between the respondent and such employees, the respondent distributed to all the employees in the appropriate unit, without consultation with the Union and without its knowledge, and since August 12, 1941, has given to all new employees, copies of a notice establishing unilaterally a procedure for the adjustment of disputes or grievances arising between the respondent and its employees; (2) that

the procedure thus unilaterally established by the respondent provided that grievances would be handled directly with the employees involved and without the knowledge, consent, or participation of the Union; (3) that, by the issuance of the notice and the establishment of this procedure, the respondent has refused and is refusing to bargain collectively with the Union as the exclusive representative of its employees; and (4) that, by the issuance of the notice and the establishment of this procedure, the respondent has interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act.

Pursuant to notice, a hearing was held at Los Angeles, California, on April 27, 1942, before C. W. Whittemore, the Trial Examiner duly designated by the Chief Trial Examiner. The Board, the respondent, and the Union were represented at and participated in the hearing. Full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing upon the issues was afforded all parties.

At the opening of the hearing the respondent filed its answer, in which it admitted having engaged in the acts alleged, but denied that said acts constituted unfair labor practices within the meaning of the Act. As an affirmative defense the answer alleged, in substance, that under the contract between the respondent and the Union it was agreed that any individual employee or group of employees should have the right at any time to present griev-

ances to the respondent. Also at the opening of the hearing, the respondent moved that the complaint be dismissed forthwith, on the ground that the acts alleged in the complaint could not lead or tend to lead to labor disputes burdening or obstructing commerce or the free flow of commerce, because the contract between the respondent and the Union provides that disputes shall be arbitrated and that there shall therefore be no strikes or lockouts during the term of the contract. The motion was denied by the Trial Examiner. At the close of the hearing, he reserved ruling upon a renewal of the same motion, which he thereafter denied in his Intermediate Report.<sup>1</sup> During the hearing the respondent offered

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<sup>1</sup> Since Section 10 (a) of the Act provides that the power of the Board to prevent unfair labor practices affecting commerce "shall be exclusive and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise," it is clear that the contract's arbitration provision does not deprive the Board of jurisdiction it would otherwise have. Cf. *N.L.R.B. v. Newark-Morning Ledger Co.*, 120 F. (2d) 266 (C.C.A. 3). The no-strike, no-lock-out provision in the contract is, of course, designed to keep disputes between the parties from interrupting the respondent's operations and thereby burdening or obstructing commerce, but it constitutes no guarantee that such interruptions will not occur. Furthermore, a labor organization's agreement not to strike cannot be regarded as precluding the Board from proceeding under the Act to prevent unfair labor practices; the very purpose of the Act is to remove unfair labor practices before they result in labor disputes affecting commerce.

to prove that only 2 grievances had been handled under the grievance procedure outlined in its notice of August 12, 1941, and that over 800 had been handled under the contract procedure. It also offered to prove that, after the filing of the original charge by the Union, and after consultation by the respondent with the Regional Director, a substitute notice was prepared for distribution, but that it was not distributed because of the issuance of the complaint herein.<sup>2</sup> Both offers of proof were rejected by the Trial Examiner.<sup>3</sup> During the course of the hearing, the Trial Examiner made rulings on other motions and on the admissibility of evidence. The Board has reviewed the rulings of the Trial Examiner and finds that no prejudicial errors were committed. The rulings are hereby affirmed. At the close of the hearing, counsel for the Board, the respondent, and the Union argued orally, on the record, before the Trial Examiner. Briefs were thereafter filed with him by the respondent and the Union.

Thereafter, the Trial Examiner filed his Intermediate Report, dated May 20, 1942, copies of which were duly served upon the parties. He found that

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<sup>2</sup> The respondent admitted that the Union had not been consulted about the proposed substitute notice.

<sup>3</sup> The Board accepts as true the facts which the respondent offered to prove. Assuming their truth, they do not affect the Board's decision as hereinafter set forth.

the respondent had engaged in and was engaging in unfair labor practices affecting commerce, within the meaning of Section 8 (1) and (5) and Section 2 (6) and (7) of the Act, and recommended that the respondent cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. Exceptions to the Intermediate Report were filed by the respondent on June 22, 1942. The respondent and the Union filed briefs on June 29, 1942, and supplemental briefs on July 13, 1942; and on July 23, 1942, the respondent filed a reply to the Union's supplemental brief.

Upon request of the parties and pursuant to notice, a hearing was duly held before the Board in Washington, D. C., on July 14, 1942, for the purpose of oral argument. The respondent and the Union were represented by counsel and participated in the hearing.

The Board has considered the exceptions and briefs filed by the parties and, insofar as the exceptions are inconsistent with the findings, conclusions, and order set forth below, finds them to be without merit.

Upon the entire record in the case, the Board makes the following:

## FINDINGS OF FACT

### I. The business of the respondent

North American Aviation, Inc., is a Delaware corporation having its principal office and place of business at Inglewood, County of Los Angeles,



California, where it owns and operates a plant for the manufacture of aircraft and aircraft parts and accessories. During 1941 the respondent purchased raw materials valued at more than \$17,000,000. Of this total, raw materials valued at more than \$15,300,000 were transported to the Inglewood plant from points outside the State of California. During the same period the respondent sold aircraft and aircraft parts and accessories produced by it for a sum in excess of \$69,500,000. Of this total, products selling for more than \$62,550,000 were transported from its Inglewood plant to States other than California, and to foreign countries.

The respondent concedes that its operations affect commerce, within the meaning of the Act.

## II. The organization involved

United Automobile, Aircraft and Agricultural Implement Workers of America, Local 887, is a labor organization affiliated with the Congress of Industrial Organizations, admitting to membership employees of the respondent.

## III. The unfair labor practices

### A. The appropriate unit and the majority status of the Union

On January 23, 1941, the Board issued a Decision and Direction of Election in which it found that the respondent's production, inspection, timekeeping, production control, storekeeping, and maintenance employees, with certain specified inclusions and exclusions, constituted an appropriate bargain-

ing unit; and on April 14, 1941, the Board certified International Union, United Automobile Workers of America, Local 683, C.I.O., Aircraft Division, as the exclusive bargaining representative of all such employees.<sup>4</sup> On July 18, 1941, the respondent and Local 683 entered into a collective bargaining agreement, by the terms of which the respondent recognized Local 683 as the exclusive collective bargaining representative of all employees in the appropriate unit. Thereafter the Union, a local of the same parent organization, became the successor to Local 683.<sup>5</sup> Since then, the respondent has recognized the Union as the bargaining representative of its employees in the unit found appropriate by the Board. Neither the appropriateness of that unit nor the representative status of the Union is contested in the present proceeding.

We therefore find, as we did in the prior representation proceeding, that the production, inspection, timekeeping, production control, storekeeping, and maintenance employees at the respondent's

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<sup>4</sup> Matter of North American Aviation, Inc., and International Union, United Automobile Workers of America, Local 683, C. I. O., 29 N.L.R.B. 148 and 30 N.L.R.B. 1196.

<sup>5</sup> Local 683 admitted to membership employees of aircraft companies other than the respondent, as well as employees of the respondent; membership in the Union is restricted to employees of the respondent. For the purposes of this decision the two locals are considered as a single organization and are both hereinafter referred to as the Union.

Inglewood plant, including group and working leadmen, but excluding office workers, employees of the engineering department, welders, plant police, supervisors, officials who have the right to hire and discharge, and all other supervisory employees including and above the rank of assistant foremen, constitute a unit appropriate for the purposes of collective bargaining, and that said unit insures to employees of the respondent the full benefit of their right to self-organization and collective bargaining and otherwise effectuates the policies of the Act. We further find that, at all times since April 14, 1941, the Union has been, and that it now is, the exclusive representative of all the employees in said unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other conditions of employment.

B. The respondent's grievance procedure

Article V of the contract between the respondent and the Union reads, in part, as follows:

Grievance Procedure

(1) In the event of any dispute arising regarding the interpretation or application of any of the terms of this agreement or any other request or grievance there shall be no stoppage of work by any employee, and all such matters shall be adjusted according to the following procedure:

(a) Between the aggrieved employee and his foreman or with his representative and his foreman.

(b) Between the district steward and the factory manager or his authorized representative.

(c) Between the plant grievance committee of the shift and the works manager or his authorized representative on that shift.

Other subdivisions of the same article relate to various details of the procedure, including a provision for appeal to the general manager or his authorized representative in any case not satisfactorily adjusted by the plant grievance committee on the shift on which the grievance arose and the management's representative on that shift. Subdivision "(10)," the last subdivision of the article, reads as follows:

(10) No provision of this Article shall be interpreted to prevent any employees or group of employees from presenting grievances to the management in accordance with the provisions of Section 9 (a) of the National Labor Relations Act.<sup>6</sup>

Article VI of the contract makes provision for

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<sup>6</sup>Section 9 (a) of the Act provides that: "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided. That any individual employee or a group of employees shall have the right at any time to present grievances to their employer."

the arbitration of grievances or disputes with respect to the interpretation or application of any of the terms of the agreement not satisfactorily settled under the grievance procedure.

On August 12, 1941, less than a month after the signing of the agreement with the Union, the respondent distributed to each of its employees in the unit covered by the contract, and since August 12 it has given to each new employee, a copy of the agreement and also a copy of the following notice:

## INFORMATION FOR EMPLOYEES

### Grievance Procedure

In accordance with the National Labor Relations Act and the policy of North American Aviation, Inc., every employee has the privilege of presenting his grievances directly to the Management.

In order that this procedure may be known to employees, the following steps are outlined:

1. Employees must first take up the matter with their Foreman. If a satisfactory settlement is not reached, the employees may request the presence of a member of the Industrial Relations Department who will help in attempting to adjust the matter.

2. If the complaint is not adjusted satisfactorily, a member of the Industrial Relations Department will arrange a hearing with the Works Manager or his representative.

3. Should the decision of the Works Manager not be satisfactory to the employee, he may, if he so desires, present a written appeal to the President of the Company. The Industrial Relations Department will assist the employee in arranging for the presentation of his case.

4. Should the decision of the President not be satisfactory, and the employee so desires, the matter may be submitted to outside arbitration in a manner mutually acceptable to both the employee and the Company.

The Industrial Relations Staff is available to all employees who may desire information or assistance with respect to their rights or privileges under either company policy or collective bargaining. Employees desiring to contact the Industrial Relations Department may call at the following hours Monday through Friday:

First shift—At the conclusion of the shift.

Second shift—Before the shift starts work.

Third shift—Third shift employees shall ask their Foreman to make arrangements for an appointment. Such matters will receive prompt attention.

NORTH AMERICAN

AVIATION, INC.

J. H. KINDELBERGER,

President

This notice was distributed by the respondent without consultation with, and without the prior knowledge of, the Union, and its distribution has been continued despite the Union's protests. No similar notice had ever been issued to its employees by the respondent prior to the execution of its contract with the Union.

At the hearing, the respondent's industrial relations director admitted that the procedure described in the notice had been put into operation. He also testified that the employees had not been notified of any limitation on the nature or type of grievances that might be submitted thereunder, and that "there would be no limitation on discussing with the employee what he might want to discuss."

### C. Conclusions

The issue is whether the respondent's unilateral establishment of a separate procedure for the settlement of grievances presented by employees individually, when there was a grievance procedure already established as a result of collective bargaining between the respondent and the exclusive representative of its employees, constitutes an unfair labor practice within the meaning of the Act.

The respondent contends that a right on its part to set up a procedure for the settlement of individual grievances is implied in the proviso to Section 9 (a) of the Act, which states that "any individual employee or a group of employees shall have the right at any time to present grievances to their employer." We do not agree. Except insofar as the

proviso impliedly leaves an employer free, even after an exclusive representative of his employees has been duly designated, to receive and act upon grievances individually presented by employees, it does not purport to confer any rights on employers. It merely preserves for employees the right to present grievances individually to their employer, despite their designation of a collective bargaining representative. Article V, subdivision (10) of the contract between the respondent and the Union did no more.

There is no distinct cleavage between collective bargaining and the settlement of grievances, whether individual or group. Grievances and grievance procedure are normal and proper subjects of collective bargaining.<sup>7</sup> Indeed, if that were not so, the proviso

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<sup>7</sup> See *Matter of Cities Service Oil Company and National Maritime Union of America*, C.I.O., 25 N.L.R.B. 36, 44, enf'g in part, N.L.R.B. v. *Cities Service Oil Co.*, 122 F. (2d) 149 (C.C.A. 2), in which we held that, "since grievances concern 'conditions of work' within the meaning of Section 9(a) of the Act, they are proper subjects for collective bargaining." See also *Matter of Mooresville Cotton Mills and Local No. 1221, United Textile Workers of America*, 2 N.L.R.B. 952, enf'g as mod., 110 F. (2d) 179 (C.C.A. 4); *Matter of Wallace Manufacturing Company, Inc. and Local No. 2237, United Textile Workers of America*, 2 N.L.R.B. 1081, enf'g, 95 F. (2d) 818 (C.C.A. 4); *Matter of Corn Products Refining Company and United Cannery, Agricultural, Packing and Allied Workers of America, Local 169*, 22 N.L.R.B. 824; *Matter of The New York Times Company, a Corporation and Newspaper Guild of New York*, 26 N.L.R.B. 1094.



to Section 9 (a) of the Act would not have been necessary. The respondent, itself, has recognized that it is so, by negotiating with the Union regarding a grievance procedure and by providing in its contract with the Union for such a procedure. The respondent thereby obligated itself to follow the procedure thus established. By the same token, the contract, including its provisions for a grievance procedure, is binding upon all the respondent's employees in the appropriate unit, since the Union in negotiating and entering into the contract was, under the Act, representing all of them. This does not, of course, restrict their right to present grievances individually, in accordance with the proviso to Section 9 (a) of the Act.

In short, the establishment of a grievance procedure is a matter of collective bargaining and, when a grievance procedure has been established by agreement between the employer and the collective bargaining representative, it is binding on both the employer and all employees in the appropriate unit. Consequently, the respondent's establishment of another grievance procedure, without consultation with the bargaining representative of its employees, constitutes both a refusal to deal exclusively with that representative and an interference with the right of the employees to bargain collectively through representatives of their own choosing.

Moreover, a collective contract is not complete as originally negotiated, nor is the process of collective bargaining complete upon the execution of a

contract. After a contract has been negotiated and executed, it is continuously modified and supplemented by interpretations and precedents made by employer and employees from day to day in the course of their operations under the contract. This interpretation of the contract, no less than its negotiation, constitutes an integral part of the collective bargaining process.<sup>8</sup>

Disputes regarding the meaning or application of a collective contract ordinarily arise as grievances, and are therefore settled through the grievance procedure. But, whether grievances are presented to the employer and are handled by the collective bargaining representative or by individual employees or groups of employees, they must be settled in accordance with the provisions and interpretation of the contract between the employer and the exclusive bargaining representative by

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<sup>8</sup> "The written contract is a general constitution upon which a body of industrial law is built. The rules and regulations first set forth in the contract are elaborated and changed from day to day in the settlement of grievances and the interpretation of the contract. Gradually they evolve into a body of industrial common law, developed in a democratic manner." Clinton S. Golden and Harold J. Ruttenberg, *The Dynamics of Industrial Democracy*, p. 43.

which the terms of employment of all the employees are established.<sup>9</sup>

Similarly, while employees have the right under Section 9 (a) of the Act to present grievances individually, such grievances must be disposed of in accordance with the contract provisions and all the precedents and interpretations established by the method mutually agreed on by the employer and the exclusive representative of his employees. Any other disposition of grievances would constitute and encourage individual bargaining, pursuant to which, in settling an individual grievance, an employer might vary a substantive provision of his

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<sup>9</sup> "Collective bargaining is the process whereby representatives of a union meet with an employer or representatives of an employers' association to fix the terms of employment for a certain period of time. But it includes more than the creation of an agreement \* \* \* It involves also the enforcement and interpretation of the agreement throughout the months of its duration." Carroll R. Daugherty, *Labor Problems in American Industry*, 1938 (Revised Edition), p. 450. See also *N.L.R.B. v. Sands Mfg. Co.*, 306 U.S. 332, in which the Supreme Court said: "The legislative history of the Act goes far to indicate that the purpose of the statute was to compel employers to bargain collectively with their employees to the end that employment contracts binding on both parties should be made. But we assume that the Act imposes upon the employer the further obligation to meet and bargain with his employees' representatives respecting proposed changes of an existing contract and also to discuss with them the true interpretation if there is any doubt as to its meaning."

agreement with the exclusive bargaining representative. Such individual bargaining would undermine the entire process of collective bargaining, contrary to the basic policy of the Act to encourage "the practice and procedure of collective bargaining."

In the present case, the respondent's employees, prior to the issuance of the notice of August 12, 1941, had not only selected a collective bargaining representative, but through that representative had agreed on a procedure for settling grievances, specifically including disputes arising "regarding the interpretation or application of any of the terms" of the agreement. By its notice, however, the respondent established a second procedure, which in its operation would necessarily involve interpretation of the contract by the employer dealing with individual employees or by an arbitrator agreed on by the employer and the employee involved. This procedure was referred to as the "company policy," thus implicitly expressing the respondent's preference for it and inviting the employees to use it rather than the contract procedure. Moreover, as part of the procedure, the respondent designated its industrial relations department to assist employees in presenting grievances and in effect made that department their representative, although the Act makes no provision for representation except by the exclusive representative. By the above conduct, the respondent clearly refused to deal exclusively with the Union and interfered with the rights

of its employees to self-organization and to bargain collectively through representatives of their own choosing.

We find that the respondent, by the issuance of the notice of August 12, 1941, and by the establishment of the grievance procedure described therein, refused and is refusing to bargain collectively with the Union as the exclusive representative of its employees in an appropriate unit. We further find that the respondent, by the issuance of said notice and the establishment of said procedure, interfered with, restrained, and coerced, and is interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act.

#### IV. The effect of the unfair labor practices upon commerce

The activities of the respondent set forth in Section III, above, occurring in connection with the operations of the respondent described in Section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

#### V. The remedy

Having found that the respondent has engaged in certain unfair labor practices, we shall order it to cease and desist therefrom and to take certain affirmative action which we find will effectuate the policies of the Act.

We have found that the respondent, by the issuance of the notice of August 12, 1941, and by the establishment of the grievance procedure described therein, has refused to bargain collectively with the Union. We shall therefore order the respondent to inform its employees that the notice of August 12, 1941, is null and void and that the respondent will give no effect to the grievance procedure thereby established. We shall also order the respondent, upon request, to bargain collectively with the Union as the exclusive representative of its employees within the appropriate unit.

Upon the basis of the foregoing findings of fact and upon the entire record in the case, the Board makes the following:

### CONCLUSIONS OF LAW

1. United Automobile, Aircraft and Agricultural Implement Workers of America, Local 887, C.I.O., is a labor organization, within the meaning of Section 2 (5) of the Act.

2. The production, inspection, timekeeping, production control, storekeeping, and maintenance employees at the respondent's Inglewood plant, including group and working leadmen, but excluding office workers, employees of the engineering department, welders, plant police, supervisors, officials who have the right to hire and discharge, and all other supervisory employees including and above the rank of assistant foremen, constitute a unit ap-

propriate for the purposes of collective bargaining, within the meaning of Section 9 (b) of the Act.

3. United Automobile, Aircraft and Agricultural Implement Workers of America, Local 887, C.I.O., or its predecessor, International Union, United Automobile Workers of America, Local 683, C.I.O., Aircraft Division, was on August 12, 1941, and at all times thereafter has been the exclusive representative of all the employees in such unit for the purposes of collective bargaining, within the meaning of Section 9 (a) of the Act.

4. By refusing on August 12, 1941, and at all times thereafter, to bargain collectively with United Automobile, Aircraft and Agricultural Implement Workers of America, Local 887, C.I.O., as the exclusive representative of its employees in the appropriate unit, the respondent has engaged in and is engaging in unfair labor practices, within the meaning of Section 8 (5) of the Act.

5. By interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, the respondent has engaged in and is engaging in unfair labor practices, within the meaning of Section 8 (1) of the Act.

6. The aforesaid unfair labor practices are unfair labor practices affecting commerce, within the meaning of Section 2 (6) and (7) of the Act.

**ORDER**

Upon the basis of the foregoing findings of fact and conclusions of law, and pursuant to Section 10 (c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that the respondent, North American Aviation, Inc., Inglewood, California, and its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with United Automobile, Aircraft and Agricultural Implement Workers of America, Local 887, C.I.O., as the exclusive representative of all production, inspection, timekeeping, production control, storekeeping, and maintenance employees at the respondent's Inglewood plant, including group and working leadmen, but excluding office workers, employees of the engineering department, welders, plant police, supervisors, officials who have the right to hire and discharge, and all other supervisory employees including and above the rank of assistant foremen;

(b) Distributing to its employees copies of its notice of August 12, 1941, above described, or of any similar notice, and from giving effect to the grievance procedure thereby established;

(c) Engaging in any like or related acts or conduct interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their



own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the Act.

2. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain collectively with United Automobile, Aircraft and Agricultural Implement Workers of America, Local 887, C.I.O., as the exclusive representative of all production, inspection, timekeeping, production control, store-keeping, and maintenance employees at the respondent's Inglewood plant, including group and working leadmen, but excluding office workers, employees of the engineering department, welders, plant police, supervisors, officials who have the right to hire and discharge, and all other supervisory employees including and above the rank of assistant foremen, in respect to rates of pay, wages, hours of employment, and other conditions of employment;

(b) Inform in writing each of its employees who has been given a copy of the notice of August 12, 1941, that said notice is null and void and that the respondent will give no effect to the grievance procedure described therein;

(c) Post immediately in conspicuous places throughout its Inglewood plant, and maintain for a period of at least sixty (60) consecutive days from

the date of posting, notices to its employees stating: (1) that the respondent will not engage in the conduct from which it is ordered to cease and desist in paragraphs 1 (a), (b), and (c) of this Order; and (2) that the respondent will take the affirmative action set forth in paragraphs 2 (a) and (b) of this Order;

(d) Notify the Regional Director for the Twenty-first Region in writing, within ten (10) days from the date of this Order, what steps it has taken to comply herewith.

Signed at Washington, D. C., this 29 day of September 1942.

[Seal]

HARRY A. MILLIS

Chairman

WM. M. LEISERSON

Member

NATIONAL LABOR

RELATIONS BOARD

In the United States Circuit Court of Appeals  
for the Ninth Circuit

No. 10313

NATIONAL LABOR RELATIONS BOARD,  
Petitioner,

v.

NORTH AMERICAN AVIATION, INC.  
Respondent.

PETITION FOR ENFORCEMENT OF AN  
ORDER OF THE NATIONAL LABOR  
RELATIONS BOARD

To the Honorable, the Judges of the United States  
Circuit Court of Appeals for the Ninth Cir-  
cuit:

The National Labor Relations Board, pursuant to the National Labor Relations Act (Act of July 5, 1935, 49 Stat. 449, c. 372, 29 U.S.C. § 151 et seq.), respectfully petitions this Court for the enforcement of its order against respondent, North American Aviation, Inc., Inglewood, California, and its officers, agents, successors, and assigns. The proceeding resulting in said order is known upon the records of the Board as "In the Matter of North American Aviation, Inc., and United Automobile, Aircraft and Agricultural Implement Workers of America, Local 887, C.I.O., Case No. C-2198."

In support of this petition, the Board respectfully shows:

(1) Respondent is a Delaware corporation, en-

gaged in business in the State of California, within this judicial circuit, where the unfair labor practices occurred. This Court therefore has jurisdiction of this petition by virtue of Section 10 (e) of the National Labor Relations Act.

(2) Upon all proceedings had in said matter before the Board, as more fully shown by the entire record thereof certified by the Board and filed with this Court herein, to which reference is hereby made, and including, without limitation, complaint and notice of hearing, respondent's answer to complaint, hearing for the purpose of taking testimony and receiving other evidence, Intermediate Report, respondent's exceptions thereto, order transferring case to the Board, and oral argument before the Board, the Board, on September 29, 1942, duly stated its findings of fact, conclusions of law and issued an order directed to the respondent and its officers, agents, successors, and assigns. The aforesaid order provides as follows:

### ORDER

Upon the basis of the foregoing findings of fact and conclusions of law, and pursuant to Section 10 (c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that the respondent North American Aviation, Inc., Inglewood, California, and its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with United Automobile, Aircraft and Agricultural

Implement Workers of America, Local 887, C.I.O., as the exclusive representative of all production, inspection, timekeeping, production control, storekeeping, and maintenance employees at the respondent's Inglewood plant, including group and working leadmen, but excluding office workers, employees of the engineering department, welders, plant police, supervisors, officials who have the right to hire and discharge, and all other supervisory employees including and above the rank of assistant foremen;

(b) Distributing to its employees copies of its notice of August 12, 1941, above described, or of any similar notice; and from giving effect to the grievance procedure thereby established;

(c) Engaging in any like or related acts or conduct interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the Act.

2. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain collectively with United Automobile, Aircraft and Agricultural

Implement Workers of America, Local 887, C.I.O., as the exclusive representative of all production, inspection, timekeeping, production control, storekeeping, and maintenance employees at the respondent's Inglewood plant, including group and working leadmen, but excluding office workers, employees of the engineering department, welders, plant police, supervisors, officials who have the right to hire and discharge, and all other supervisory employees including and above the rank of assistant foremen, in respect to rates of pay, wages, hours of employment, and other conditions of employment;

(b) Inform in writing each of its employees who has been given a copy of the notice of August 12, 1941, that said notice is null and void and that the respondent will give no effect to the grievance procedure described therein;

(c) Post immediately in conspicuous places throughout its Inglewood plant, and maintain for a period of at least sixty (60) consecutive days from the date of posting, notices to its employees stating: (1) that the respondent will not engage in the conduct from which it is ordered to cease and desist in paragraphs 1 (a), (b), and (c) of this Order; and (2) that the respondent will take the affirmative action set forth in paragraphs 2 (a) and (b) of this Order;

(d) Notify the Regional Director for the Twenty-first Region in writing, within ten (10)

days from the date of this Order, what steps it has taken to comply herewith.

(3) On September 29, 1942, the Board's decision and order was served upon respondent by sending a copy thereof postpaid, bearing Government frank, by registered mail, to Messrs. Neary, Powers, and Peckham, Jr., respondent's attorney in Los Angeles, California.

(4) Pursuant to Section 10 (e) of the National Labor Relations Act, the Board is certifying and filing with this Court a transcript of the entire record in the proceeding before the Board, including the pleadings, testimony and evidence, findings of fact, conclusions of law, and order of the Board.

Wherefore, the Board prays this Honorable Court that it cause notice of the filing of this petition and transcript to be served upon respondent and that this Court take jurisdiction of the proceedings and of the questions determined therein and make and enter upon the pleadings, testimony and evidence and the proceedings set forth in the transcript, and the order made thereupon set forth in paragraph (2) hereof, a decree enforcing in whole said order of the Board and requiring respondent, and its officers, agents, successors, and assigns to comply therewith.

NATIONAL LABOR RELATIONS BOARD

By ERNEST A. GROSS

Associate General Counsel

Dated at Washington, D. C., this 17th day of November, 1942.

District of Columbia—ss:

Ernest A. Gross, being first duly sworn, states that he is Associate General Counsel of the National Labor Relations Board, petitioner herein, and that he is authorized to and does make this verification in behalf of said Board; that he has read the foregoing petition and has knowledge of the contents thereof; and that the statements made therein are true to the best of his knowledge, information and belief.

ERNEST A. GROSS

Associate General Counsel

Subscribed and sworn to before me this 17th day of November, 1942.

[Seal]

JOSEPH W. KULKIS

Notary Public, District of  
Columbia.

My Commission expires April 15, 1947.

[Endorsed]: Filed Nov. 24, 1942.

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## ORDER TO SHOW CAUSE

CCA No. 10313

United States of America—ss:

The President of the United States of America  
To North American Aviation, Inc., 223 East Regen  
St., Inglewood, California, and United Automobile,  
Aircraft and Agricultural Implement  
Workers of America, Local 887, C.I.O., 5851



South Avalon Blvd., Los Angeles, California,  
Greeting:

Pursuant to the provisions of Subdivision (e) of Section 160, U.S.C.A. Title 29 (National Labor Relations Board Act, Section 10(e)), you and each of you are hereby notified that on the 23rd day of November, 1942 a petition of the National Labor Relations Board for enforcement of its order entered on September 29, 1942 in a proceeding known upon the records of the said Board as "In the Matter of North American Aviation, Inc., and United Automobile, Aircraft and Agricultural Implement Workers of America, Local 887, C.I.O., Case No. C-2198," and for entry of a decree by the United States Circuit Court of Appeals for the Ninth Circuit, was filed in the said United States Circuit Court of Appeals for the Ninth Circuit, copy of which said petition is attached hereto.

You are also notified to appear and move upon, answer or plead to said petition within ten days from date of the service hereof, or in default of such action the said Circuit Court of Appeals for the Ninth Circuit will enter such decree as it deems just and proper in the premises.

Witness, the Honorable Harlan Fiske Stone, Chief Justice of the United States, this 24th day of November, in the year of our Lord one thousand, nine hundred and forty-two.

[Seal]                      PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

## RETURN ON SERVICE OF WRIT

United States of America,  
Southern District of California—ss.

I hereby certify and return that I served the annexed Order to Show Cause and copy of Petition on the therein-named United Aut. Aircraft and Agricultural Implement Workers of America, Local 887, C.I.O., by handing to and leaving a true and correct copy with Lew Michener, West Coast Director, personally at 5851 Avalon Block, Los Angeles, Cal., in said District on the 26th day of Nov., 1942.

ROBERT E. CLARK,

U. S. Marshal.

By FRANK L. BESSER,

Deputy

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## RETURN ON SERVICE OF WRIT

United States of America,  
Southern District of California—ss.

I hereby certify and return that I served the annexed Order to Show Cause and **Certified Copy of** Petition on the therein-named North American Aviation, Inc., by handing to and leaving a true and correct copy thereof with S. G. Anspach, Treas., personally at 223 E. Regen St., Inglewood, Calif., in said District on the 3rd day of Dec., 1942.

ROBERT E. CLARK

U. S. Marshal

By FRANK L. BESSER

Deputy

[Title of Circuit Court of Appeals and Cause.]

ANSWER TO PETITION FOR  
ENFORCEMENT

To the Honorable Chief Justice and Associate Justices of the United States Circuit Court of Appeals for the Ninth Circuit.

Respondent, North American Aviation, Inc., for answer to the petition for enforcement of an order against Respondent filed herein by the National Labor Relations Board, respectfully shows:

I.

The order of said Board for which an order of enforcement is sought is improper, void and in excess of the jurisdiction of the Board for the following reasons:

1. There was no proof before the Board that any act complained of constituted an unfair labor practice on the part of Respondent or interfered with or restrained or had a tendency to interfere with or restrain, commerce.

2. The decision of the Board is based upon assumed issues and charges which are entirely beyond the allegations of the complaint and without basis in the evidence.

3. The decision is in conflict with the proviso of Section 9(a) of the National Labor Relations Act granting to individual employees or minority elements the right of individual presentation of griev-

ances. The right of presentation of grievances implies the right to obtain adjustment thereof, even by arbitration when necessary.

4. The decision is in violation of the provisions of the contract between Respondent and the Union providing for individual grievance presentation and also providing for settlement by arbitration of any grievance or dispute with respect to the interpretation or application of any of the terms of said contract.

5. The order of the Board is too broad. The sole issue was the propriety of the particular notice given by the employer with respect to individual grievance presentation. There is no issue and no proof of any refusal to bargain collectively.

Dated: Los Angeles, California, December 1, 1942.

GIBSON, DUNN & CRUTCHER  
By J. STUART NEARY  
Attorneys for North American Aviation, Inc.  
IRA C. POWERS  
Of Counsel.

(Duly Verified.)

Copy mailed to Attorney for Petitioner Dec. 11, 1942.

[Endorsed]: Filed Dec. 12, 1942.

Before The National Labor Relations Board  
Twenty-First Region

Case No. XXI-C-1864

In the Matter of:

NORTH AMERICAN AVIATION, INC.

and

UNITED AUTOMOBILE, AIRCRAFT AND  
AGRICULTURAL IMPLEMENT WORK-  
ERS OF AMERICA, LOCAL 887, C.I.O.

PROCEEDINGS

Room 808, United States Court House and Post  
Office Building, Spring, Temple and Main  
Streets, Los Angeles, California, Monday, April  
27, 1942.

The above-entitled matter came on for hearing,  
pursuant to notice, at 10:00 o'clock a.m.

Before:

Charles W. Whittemore, Trial Examiner. [1\*]

Mr. Jennings: It is stipulated between all  
parties that the allegations of paragraphs IV, V  
and VI of the complaint, and the allegations of  
paragraph VII down to and including the end of  
the third sentence thereof are true and correct and  
that the Board may so find. [9]

And for the purpose of clarity, I should like to  
read the portion of Paragraph 7 that is stipulated  
between all parties to be true:

“Respondent by its officers and agents, while  
engaged as described in paragraphs 1, 2, and 3

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\* Page numbering appearing at top of page of original Reporter's Transcript.

hereof, on or about August 12, 1941, distributed to all of its employees within the unit covered by its contract with the union a notice, a true and correct copy of which is attached hereto, marked Exhibit "B", and incorporated herein by reference as though fully set forth herein, and a copy of said contract, Exhibit "A", attached hereto. Said notice was distributed without consultation with, or notification of the union, and without the knowledge of the union. Since August 12, 1941, respondent has given a copy of said notice and of said contract to each employee upon his employment."

Mr. Neary: So stipulated.

Mr. Kaplan: So stipulated.

Mr. Jennings: It is further stipulated that Exhibit "A" attached to the complaint, and referred to in Paragraph 6 of the answer is a true and correct copy of that document, that Exhibit "B" attached to the complaint referred to in Paragraph 7 thereof is a true and correct copy of that document.

Mr. Neary: The one attached to the complaint, Exhibit [10] "A", is a printed copy?

Mr. Jennings: That is correct.

Mr. Neary: So stipulated. With a change in Exhibit "B" which you mentioned in there.

Mr. Jennings: That is right.

I should like to call to the attention of the Trial Examiner, and for the record, the fact that the notice, Exhibit "B", attached to the complaint, a copy of which is also attached to the charge, has a cor-

rection made in ink on the face of it in paragraph No. 2, the third and last sentence. The language should be: "Works manager or his representative" instead of "Works manager of his representative."

Mr. Neary: I wonder if I could see that for just a minute.

Mr. Jennings: Surely.

Mr. Neary: So stipulated.

Mr. Kaplan: So stipulated.

Mr. Jennings: May it be further stipulated between all parties, referring now to Paragraph 5 of the complaint, that the proceedings before the National Labor Relations Board under Section 9 (c) of the Act referred to therein are reported in the following volumes of National Labor Relation Board decisions and orders: That the decision and direction of election in the matter, issued January 23, 1941, is reported [11] in Volume 29, National Labor Relations Board Decisions and Orders No. 27; that the supplemental decision, and second direction of election, issued February 28, 1941, is reported in Volume 29, National Labor Relations Board Decisions and Orders, No. 27-A; and that Board's certification of the union issued April 14, 1941, is reported in Volume 30, National Labor Relations Board Decisions and Orders, No. 169.

Mr. Neary: I haven't checked those, but I am perfectly willing to stipulate on Mr. Jennings's statement that is where they are reported.

Trial Examiner Whittemore: You are willing to accept that?

Mr. Kaplan: I am, yes.

Trial Examiner Whittemore: I assume, of course, that if the Board discovers that Mr. Jennings has misquoted the number of those volumes, that the Board will have the privilege of correcting them.

Mr. Jennings: I have the copies right here, Mr. Examiner. I don't think there is any question about them.

Trial Examiner Whittemore: I don't think there is any question about it. There may be a typographical error or something. The decisions are at issue, not the numbers.

Mr. Jennings: And it is further stipulated by all parties that the Board may find to be true all of the facts [12] so stipulated to be true?

Mr. Neary: Yes, so stipulated.

Mr. Kaplan: So stipulated. [13]

Mr. Neary: The respondent desires to move to dismiss the complaint—this motion to dismiss is more in the nature of a general demurrer to the complaint—on the ground that the complaint does not state facts sufficient to sustain a charge or finding that an unfair labor practice has been committed.

The complaint alleges that the respondent is guilty of two acts of unfair labor practice: First, a violation of 8 (1); secondly, a violation of 8 (5). And the acts respondent is accused of are the publication and distribution of the [14] notice which is set forth in the complaint as Exhibit B, which in effect sets forth a procedure, which the company



will follow in handling grievances of employees who do not desire to submit for adjustment their grievances through the union's steward, and the procedure outlined in Articles 5 and 6 of the contract between the parties, which is attached to the complaint as Exhibit A.

The complaint alleges, in substance, that the acts complained of are unfair labor practices in that they have a close and intimate relationship to commerce and have led, and tend to lead, to labor disputes burdening or obstructing commerce.

Exhibit A, the contract between the parties, was first a negotiated contract. I don't think there is any issue with respect to that. The company recognizes Local 887, or it was 683 in the certification, an amalgamated local, which later was broken up into a separate local and a charter to 887 was granted, but the company has recognized 887 as the collective bargaining agent for its employees in the unit described in the certification; and, as a result of that recognition, sat down with the union and negotiated this contract, Exhibit A.

Article 5 of that contract sets forth a grievance procedure. Going through the grievance procedure, as set forth in Article 5, we find that in all cases, except in [15] paragraph 1 (a), the employee must present his grievance in the other steps of the procedure through a district steward or other union representative. The first step reads as follows: "Between the aggrieved employee and his foreman or with his representative and his foreman.

"Between the district steward and the factory

manager——” after that step, the grievance must be presented according to the terms of Article 5 through the union representative.

At the time of the negotiations, the question arose as to whether or not employees had a right to present grievances individually without the representation of the union. That was admitted by the union and pursuant to that agreement, paragraph 10 of Article 5 was incorporated expressly in the agreement. This article reads: “No provision of this article shall be interpreted to prevent any employees or group of employees from presenting grievances to the management in accordance with the provisions of Section 9 (a) of the National Labor Relations Act.” Which section provides that the individual employee, or group of employees, may present grievances to the management for adjustment.

The reason the paragraph was specifically put in there was because, as appears from Article 5, every step of the grievance procedure, after the first, required that the grievance be presented through the union steward rather than through the individual employee. That fact being true, and [16] this provision having been negotiated and this fundamental right having been agreed upon by the parties, there cannot be any unfair labor practice here even though you admit all of the facts alleged in the complaint, which first leads or tends to lead to a labor dispute, which burdens or obstructs commerce.

The reason being that in Article 6, paragraph 1, the article provides:

“If a grievance or dispute with respect to the interpretation or application of any of the terms of this agreement is not satisfactorily settled, either party to this contract shall request that the matter be submitted for settlement to arbitration. If such request is made, the other party shall also agree to submit the matter to arbitration, and it is understood and agreed that the decision of the arbitration board, as provided for in this article, shall be final and binding upon both parties, and therefore it is agreed that during the term of this agreement the union or its members shall not call or engage in, sanction, or assist in, any sympathy strike against, or any slow-down or stoppage of work, of the company, and the union will require its members to perform their services for the company when required by the company to do so, and during [17] the term of this agreement, the company shall not cause or permit any lockout of the members of the union.”

There is no allegation in this complaint that the union involved ever presented to the procedures set forth in articles 5 and 6 of the contract this question with reference to the interpretation of paragraph 10, article 5.

Fundamentally, the parties have agreed by paragraph 10, article 5, that employees can present

grievances individually. If employees can present grievances individually there must be some procedure by which those grievances will be received and adjusted by the company, otherwise you run into the practical difficulty of a settlement of grievances which is not uniform, and which may be interpreted or may actually be discriminatory as between individual employees. [18]

Secondly, if you do set up such a procedure for the receipt and adjustment of individual grievances, the procedure is worthless unless it is made known to the employees. Now, that is the position the company took. Let us assume, however, that the union disagreed that the company had the right, first, to set up a procedure other than the procedure set forth in Article 5 for the handling of grievances. The union then had a dispute with the company with respect to the interpretation of Paragraph 10 of Article 5, and had the right to have the matter adjusted according to the provisions of Article 5 and Article 6; adjusted, so that there would be no question of stoppage of work.

Suppose that the union contended that there were sufficient provisions in Article 5 for the handling of individual grievances and that no different procedure need be set up, and no other notice need be given except the fact that the procedure for handling individual grievances would be the same as that set up in Article 5, except that the individual employee would be without the representation of the district steward or the plant grievance

committee connected with the union. Again a dispute with reference to the interpretation of Paragraph 10 of Article 5: a dispute which, according to the provisions of the contract, may be settled and must be settled amicably and without any possibility of a labor dispute except in violation of the [19] terms of the contract.

Let us assume that the union took the stand that Paragraph 10 of Article 5 should not be interpreted as to give the right to individual employees to present, individually, grievances for adjustment. Again, a dispute to the interpretation of Paragraph 10 of Article 5, which, according to their own agreement, must be settled according to the provisions of Article 5 and Article 6. As a matter of fact, this question was a subject of grievance, as we will later develop in our testimony, if required to do so, and it went through the fourth step of grievance. We had an arbitrator chosen here to handle other matters and the union did not elect to submit this matter to arbitration.

I contend that there is no allegation in the complaint which shows that this Board has jurisdiction under the provisions of the National Labor Relations Act to make a charge of unfair labor practice, because there is no possibility of dispute leading or tending to lead to a labor dispute which would obstruct or burden commerce.

Trial Examiner Whittemore: May I interrupt just for a moment?

Mr. Neary: Yes.

Trial Examiner Whittemore: Perhaps I misunderstood you. It is my understanding of what you said that this was put through that step of arbitration and then, as I understood, [20] the union did not elect to present this point for arbitration.

Mr. Neary: I probably have misstated myself.

This question of the publication of this notice was made a subject of grievance and put through to the fourth step. That is, the provisions of the procedure set fourth in Article 5, which we call the four steps of grievance procedure, and the union did not avail itself of arbitration in Article 6, although other disputes were pending and were arbitrated, and an arbitrator had been appointed by the parties and, as a matter of convenience, they could have easily thrown this dispute in for arbitration at the same time.

Trial Examiner Whittemore: Have you finished now?

Mr. Neary: Yes.

I move that the complaint be dismissed on the ground that the allegations of the complaint do not show any unfair labor practice within the meaning of the National Labor Relations Act. [21]

Mr. Neary: I will stipulate that Local 683, which was [22] the certified local, was an amalgamated local, which admitted to its membership not only employees of North American Aviation, Inc., but employees of other aircraft companies as well; and that subsequent to the certification, and subsequent

to the signing of the contract, the members of Local 683, employees of North American Aviation, Inc., at Inglewood, petitioned the International for a separate charter and that that petition was granted and that Local 887 is the successor of 683, so far as the employee members at North American Aviation, Inc. is concerned. Did I state that correctly?

Mr. Kaplan: That is a correct statement.

Mr. Jennings: That is what I intended to say. May that be stipulated to by all parties?

Mr. Kaplan: Yes.

Mr. Neary: Yes.

Trial Examiner Whittemore: Mr. Neary, have you anything further?

Mr. Neary: Yes. I would like to point out that Section [23] 10 (a) and (b) of the Act is not an answer to my motion to dismiss. We are not contending that the contract here sets up a different method of determining whether an unfair labor practice exists than that set forth in the Act. We are not attempting to deprive the Board of any jurisdiction. What we are saying, and what Section 10 talks about is an unfair labor practice listed in Section (a) affecting commerce; and there is no such thing as an unfair labor practice under the terms of the Act that does not affect commerce and have a tendency or will lead to a labor dispute affecting commerce. Now, we are not attempting to dispute with the Board its jurisdiction and allege that the union and ourselves can set up a method by which we can settle questions of unfair labor practices that exist between us.

What we are fundamentally saying is this: that no unfair labor practice existed over which the Board has jurisdiction because the method provided in the contract for the settling of any dispute between the parties, no matter what it may be, prevents, by agreement of the parties, any such disputes causing or tending to cause, or leading or tending to lead to a dispute which would burden or obstruct commerce.

I agree that the Board has the right to determine its own question of jurisdiction, and that is the reason that I am addressing my motion to the Board at this time. [24]

Mr. Neary: May I just for the purpose of the record add one further ground?

Trial Examiner Whittemore: Surely.

Mr. Neary: Which is that it was the purpose of Congress [25] in enacting the National Labor Relations Act to promote collective bargaining and collective agreements between the parties in an effort to avoid disputes which would affect or burden commerce, and, therefore, that this complaint, the allegations in the complaint, do not sustain a charge of unfair labor practice unless it is alleged that the parties have been unable to settle their dispute according to the provisions of the contract, the collective agreement, arrived at by the parties through the procedure set forth in the Act; and that their failure to do so threatens to burden or obstruct commerce. [26]



J. STUART NEARY,

called as a witness by and on behalf of the respondent, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Peckham) State your full name.

A. J. Stuart Neary.

Q. You are an attorney licensed to practice before the courts of California and in the District Courts of the United States? A. Yes.

Q. And you are associated with the firm of Gibson, Dunn & Crutcher? A. I am.

Q. The firm of Gibson, Dunn & Crutcher represents North American in certain matters? [29]

A. Yes; in advice and consultation on labor relations.

Q. You are the associate of that firm assigned by it to advise North American Aviation, Inc., on these matters? A. I am.

Q. Calling your attention to Exhibit A, the contract which is Exhibit A attached to the complaint, entered into between North American Aviation, Inc. and the union involved in this proceeding, which purports to have been executed on the 18th day of July, 1941, did you take part in the negotiation of that contract?

A. Yes; as legal representative of the corporation.

Q. Were there any other representatives of North American Aviation, Inc. present during all of the negotiations leading up to that contract?

(Testimony of J. Stuart Neary.)

A. No.

Q. When were those negotiations finally consummated?

A. On July 1, 1941, with the exception of certain matters, editorial changes that were effectuated between July 1st and July 18, 1941.

Q. Where did those negotiations take place, Mr. Neary?

A. The negotiations started at the company plant at Inglewood, California, and the actual negotiations, which resulted in the agreement, particularly, with reference to Article 5 and Article 6 of the contract were consummated in the new Social Security Building, Washington, D. C. on July 17 [30] and 18, 1941 in the offices of the National Defense Mediation Board.

The persons present at the time these were negotiated were Mr. Richard T. Frankenstein, international representative of the U.A.W.A.-C.I.O.; Mr. Victor H. Kosche and Charles Dorchester, representatives of Local 683; and for the company, Mr. J. H. Kindelberger, president of North American Aviation, Inc., and myself.

Q. You have referred to negotiations of Article 5 and Section 6, Mr. Neary. Would you advise the Examiner as to the extent of those negotiations, particularly, with reference to the inclusion of items relating to the individual grievances in those articles?

Mr. Jennings: Mr. Examiner, I should like at

(Testimony of J. Stuart Neary.)

this point to make an objection upon the ground that the agreement, and particularly Article 5, paragraph 10, is clear and parol evidence is inadmissible to vary, alter, or contradict terms of it; and further upon the ground that Article 12 of the contract, Exhibit A in evidence, expressly provides that the agreement contains all of the covenants, stipulations, and provisions agreed upon by the parties, and no representative of either party has authority to make, and none of the parties shall be bound by, any statement, representations, or agreements not set forth here. That is in the terms of the contract. [31]

The Witness: Mr. Examiner, may I answer the objection? I am better prepared than Mr. Peckham to do so.

Trial Examiner Whittemore: I have no objection.

The Witness: I am not introducing the testimony with respect to the negotiations in an attempt to vary, alter or change the terms of this written agreement. The issue is not an issue affecting the rights of the parties under the terms of the agreement, but is rather a background of the negotiations to show why the provisions of paragraph 10, article 5, were included; and to prove further that the question as to whether or not individual employees would have a right under the terms of the contract to present grievances, individually, was recognized and negotiated by the parties.

(Testimony of J. Stuart Neary.)

Trial Examiner Whittemore: As I understand it, all of this, you assure me, is relevant to the set of facts upon which you base your case.

The Witness: That is correct. And I intend only to make a very short statement.

Trial Examiner Whittemore: The objection is overruled.

Mr. Jennings: I should like to point out that the agreement in evidence, Board's Exhibit A, attached to the complaint, article 5, section 10, refers to the right of individual employees to present grievances, stating that nothing shall be interpreted to prevent any employee from [32] presenting grievances in accordance with the act, whereas Mr. Neary's testimony seems to look toward some agreement aliunde. What we have here would provide for an adjustment or settlement of the grievances, not merely a presentation of them.

The Witness: I think you are anticipating the testimony and I suggest that a motion to strike after I have put my testimony in could be made on that ground.

Mr. Jennings: The very general nature of the question requires my objection.

Trial Examiner Whittemore: I can't at this time determine what he is going to testify. You still have your motion to strike. Upon his assurance that he will confine himself to matters which he feels are matters as a basis for his position in this case, I feel that I should hear him. That doesn't

(Testimony of J. Stuart Neary.)

deprive you of putting in such facts as are relevant.

Mr. Jennings: The testimony will be taken subject to my objection?

Trial Examiner Whittemore: Surely.

Mr. Kaplan: Mr. Examiner, I would also like to state that the three union members who were present at the negotiations are unavailable at the present time. Two of them are in the United States Navy and one of them is an associate member of the War Labor Board and is in the east. So if [33] the testimony here should become particularly relevant we should like to have permission to obtain testimony from the union members.

Trial Examiner Whittemore: That is a matter which may be——

Mr. Jennings: That is another reason for the rule which I referred to forbidding introduction of such evidence.

Trial Examiner Whittemore: The ruling will stand. How you meet any such testimony which he brings up, which you feel should be met, that is something to be taken up later. So far the point itself is more or less irrelevant to the issues and it can't possibly hurt anyone unless there is some dispute to certain facts. I think you are anticipating matters, perhaps, if you feel that he is going to testify something which your client might say was not so.

I suggest you proceed. Do you recall where you were?

(Testimony of J. Stuart Neary.)

The Witness: Yes.

When the parties reached that point in the negotiations in Washington where they were considering the wording of Article 5 of the contract, the company representatives desired that each of the steps, wording similar to paragraph 1 (a) be used in all cases, namely, that it should show clearly that the step would be between the aggrieved employee and his foreman or with his representative and foreman; between the employee and the factory manager or the district [34] steward; and between the employee and the works manager, or his authorized representative, or the plant grievance committee.

The union objected to that wording. The company representatives argued that it was necessary to set forth in the grievance procedure that individual employees had a right to present grievances according to this procedure without the representation of the district steward or the plant grievance committee. The union representatives agreed that the provisions of Section 9 (a) of the Act gave employees this right, although would not accept the company's wording of the grievance procedure.

A compromise was suggested by myself on the wording of Section 10 so as to exclude the possibility that employees would interpret the wording, for instance, in paragraph 1 (b) of article 5, between the district steward and the factory manager,

(Testimony of J. Stuart Neary.)

as excluding individual employees from taking up a grievance with the factory manager unless he took it up through the district steward and, similarly, excluding him, depriving an individual employee of the right to take a grievance up with the works manager except through the plant grievance committee. And this language was accepted as the compromise to that issue raised.

Trial Examiner Whittemore: Do you mean by that section 10? [35]

The Witness: Paragraph 10 of article 5.

Trial Examiner Whittemore: Yes.

Mr. Jennings: Does that complete the answer so I can make my motion?

The Witness: Yes.

Mr. Jennings: I should like to move to strike the answer upon the grounds of my objection, Mr. Examiner, and upon the further ground that the union could not, under any circumstances, consent to a violation of law. That consent of the union would be immaterial. If this procedure is illegal, it couldn't consent.

Mr. Peckham: If the Examiner please, it appears to me that this testimony merely goes to show the attitude of all the parties concerned in the negotiation of this contract, and also to show the attitude involved in the posting of the notice.

That is just one of the things that is involved in this proceeding. The Examiner wants to get the entire background and entire picture. The Exam-

(Testimony of J. Stuart Neary.)

iner is presenting the matter to a board in Washington, which will have no understanding of these matters unless these things are in the record, and it appears to me to be important to show the background of this whole matter. If you send a cold record back to a group in Washington, they can't see the entire picture.

The Witness: May I further call—— [36]

Trial Examiner Whittemore: First, as I understand it, you are making a motion to strike his answer.

Mr. Jennings: That is right.

Trial Examiner Whittemore: I will deny the motion so it will be unnecessary for any further argument on that.

Q. (By Mr. Peckham) Some time later after the negotiation and signing of this contract, Mr. Neary, did you receive a copy of a proposed notice from Mr. Marshall Beaman of the North American Aviation, Inc.? A. I did.

Q. With regard to what?

Trial Examiner Whittemore: Do you mind if I interrupt you for a moment?

Mr. Peckham: Not at all.

Trial Examiner Whittemore: As you say you are presenting the background and you left a gap here between something which appeared in the signed contract and the notice. This says nothing about a notice. How did you happen to ask for a notice?



(Testimony of J. Stuart Neary.)

Mr. Peckham: If your Honor please, I am attempting to develop that at this point. I felt that there was no sense in taking Mr. Neary off the stand and putting him back and forth and back and forth. We are intending to put Mr. Beaman on and show the events that transpired in between.

Trial Examiner Whittemore: You have that in mind? [37]

Mr. Peckham: That is correct.

Mr. Jennings: Are you referring, Mr. Peckham, to a document which was presented to Mr. Neary, which is here in court?

Mr. Peckham: I don't know whether it is here in court or not. I am not thinking of introducing the notice. I am merely trying to give the background of what happened.

Trial Examiner Whittemore: His question was if at a certain time there was a notice submitted to him by Mr. Beaman. That is my understanding of it in following the sequence of your background.

Mr. Jennings: If there is such a document in existence, of course, the testimony is much——

Trial Examiner Whittemore: I think we can clear that up.

The Witness: I think it will be cleared up.

Trial Examiner Whittemore: On the assurance you are going to clear this matter up I will allow you to answer.

Mr. Peckham: That is what we intend to show, if the Examiner please.

(Testimony of J. Stuart Neary.)

Trial Examiner Whittemore: All right.

The Witness: Yes. I may state in explanation of my answer, Mr. Beaman was not employed by North American Aviation, Inc. until July 15, 1941 as director of industrial relations and subsequent to the negotiation of the contract, a copy [38] of it was gone over by Mr. Beaman and he asked certain questions of explanation of myself and Mr. Kindelberger and Mr. Atwood, who is vice-president and general manager, and was in on some of the negotiation meetings, and Mr. Lambeth, who is the secretary-treasurer of the organization, North American, Inc., who was also in on some of the negotiations.

Among the questions asked was a question with respect to paragraph 10 of article 5 of the contract, a question as to whether or not it was the intention of the parties in negotiating the contract to permit individual employees to present for adjustment grievances without union representation. [39]

My answer to that question was that it was. Mr. Beaman then asked me with respect to——

Mr. Kaplan: I would like to object to this testimony and move to strike the answer on the ground that what transpired between Mr. Neary and Mr. Beaman is purely hearsay so far as the union is concerned.

Trial Examiner Whittemore: My understanding is——

Mr. Jennings: And it is definitely self-serving.

(Testimony of J. Stuart Neary.)

Trial Examiner Whittemore: There was no union representative present?

The Witness: None.

Trial Examiner Whittemore: And you will concede this was your interpretation?

The Witness: That is all I am contending.

Trial Examiner Whittemore: All right. It is simply a matter, as I understand it, which is leading up to the decision to post a notice.

The Witness: That is correct.

Trial Examiner Whittemore: I will deny the motion to strike.

Q. (By Mr. Peckham) Will you proceed, Mr. Neary?

A. Mr. Beaman then suggested that since this might not be clear to all employees that a notice setting out the method of presentation and adjustment of grievances, under the provisions of Section 10, Article 5, be posted. Mr. Beaman [40] then prepared a notice, substantially in the form of Exhibit "B", attached to the complaint, and submitted it to me for my review. I reviewed it and approved it.

The notice was then printed in booklet form, or in mimeographed form, as you have a copy there, and was distributed to all employees, together with a copy of the contract, which is Exhibit "A".

Q. Subsequent to that time, Mr. Neary, you were notified by North American Aviation that they had received a charge of an unfair labor practice from

(Testimony of J. Stuart Neary.)

the National Labor Relations Board; is that correct?      A. That is correct.

Q. In regard to the posting of this notice?

A. That is correct.

Mr. Jennings: Pardon me. You say "posting". Was this notice posted as well as distributed?

The Witness: I think that is incorrect. I think it was distributed.

Mr. Peckham: May I amend my remark for the record?

Trial Examiner Whittemore: Before you go into that, I would like to ask just how this was distributed, if you know.

The Witness: I think Mr. Beaman would be better qualified to testify.

Trial Examiner Whittemore: Would you make a note of that [41] and bring that matter out?

The Witness: I will bring that out.

Mr. Peckham: I repeat, may I ask that my remark be amended to say "distributed" rather than "posted"?

Trial Examiner Whittemore: It may be so amended.

Q. (By Mr. Peckham) Subsequent to that time, did you have a conference with Mr. Wm. R. Walsh, Regional Director for this district of the National Labor Relations Board, concerning the distribution of this notice?      A. I did.

Q. Will you relate the substance of that conversation?

(Testimony of J. Stuart Neary.)

Mr. Jennings: Mr. Examiner, I would object to that upon the grounds previously urged; that is, there is nothing that anyone could do which would alter the question of whether there was or was not a violation of law; and on the further ground that anything that may have transpired in the course of the Board's investigation of this charge is entirely immaterial to the question of whether or not an unfair labor practice was committed.

The Witness: If I may again occupy the role of an attorney, rather than witness, I may state that I only have in mind offering the fact that in the discussion with Mr. Walsh the notice, as distributed, was criticized as to its form and as to the right of the company to distribute the notice. [42]

I make that as an offer of proof with respect to this answer.

Trial Examiner Whittemore: Let me ask you this: As I understood it, the notice that was posted, and which is now in issue, is the one which you approved after it had been submitted to you by Mr. Beaman?

The Witness: Yes.

Trial Examiner Whittemore: Is there another notice involved that was posted subsequently?

The Witness: It was not posted but was prepared for distribution.

Trial Examiner Whittemore: I don't see that that is at all material. That notice is not in issue. I am willing, upon that statement of yours, to per-

(Testimony of J. Stuart Neary.)

mit an offer of proof, but since it is not in issue here in any way, I see no reason for going into what may have preceded this discussion.

The Witness: I think it would shorten things if I do make an offer of proof on that.

Trial Examiner Whittemore: As I understand it, you didn't amend or change the notice which you originally published?

The Witness: That is correct.

I offer to show by my testimony that after discussions with Mr. Walsh in which the notice. Exhibit "B", was criticized as to form and substance and as to the right of the company to [43] distribute the notice, that I again counseled with Mr. Beaman and prepared a draft of another notice. Prior to that time, however, the Local Regional Director had refused to issue a complaint, as your records will show, on the original charge. That refusal was appealed by the union to the Board in Washington and in the interim between the refusal of the Local Regional Director to issue a complaint on the first charge, and the appeal which resulted in the issuance of the present complaint, and after a discussion with Mr. Walsh regarding the notice, we prepared for employees a new notice with respect to grievance procedure. We sent it to the printers and were preparing to recall the notice, which is Exhibit "B", which had previously been distributed, and substitute for it this new notice.

And I offer in evidence, as a part of my offer of

(Testimony of J. Stuart Neary.)

proof, this notice and if it is denied admission, I ask that it be——

Trial Examiner Whittemore: Included as a rejected exhibit?

Mr. Neary: Included as a rejected exhibit. This printed booklet entitled “Information to all employees. Grievance Procedure. North American Aviation, Incorporated. Inglewood, California, February 16, 1942,” as amended by the inked changes on page 3 thereof.

After the preparation of this notice, I further offer to [44] prove, and the placing of it in the hands of the printer preparatory to distribution, we were informed by the National Labor Relations Board by the Director of the Twenty-First Region that the appeal of the union, regarding the refusal of the Regional Director to issue a complaint on the first charge in this matter, had been granted, and that the National Labor Relations Board had authorized the issuance of the complaint on this charge.

Subsequent to receiving that information, I requested the company, the respondent herein, to withhold the further printing and distribution of this amended notice.

Trial Examiner Whittemore: Now, there is a question on one point. You say “the further printing and distribution.” It is my understanding that it was neither printed or distributed.

The Witness: There has been printing.

(Testimony of J. Stuart Neary.)

Trial Examiner Whittemore: But no distribution?

The Witness: No distribution. Further printing and subsequent distribution of the amended notice.

Trial Examiner Whittemore: May I ask then, before I rule on your offer, just what you contend is the materiality of something which, as yet, has not been done.

The Witness: One of the allegations of the complaint is the refusal of the company to bargain and negotiate with the union. We are accused in the complaint of unilaterally [45] and without the knowledge of the union of having prepared and distributed this notice, Exhibit "B". All of this evidence goes to that allegation.

The evidence that we develop will further show that this matter was taken up as a grievance by the union and discussed through the fourth step of the grievance procedure; that subsequent to that time the union did not avail itself of the provisions of our article 6, arbitration, but did come to the National Labor Relations Board with a charge, and that even after the Board's refusal to issue a complaint, the Regional Director's refusal to issue a complaint, the company did attempt to change the notice and was willing to make such changes in the notice as had been criticized by the union, and by the Regional Director, and was willing to make an amendment. All to show good faith on the part of the company and a desire to negotiate.



(Testimony of J. Stuart Neary.)

Trial Examiner Whittemore: May I ask at this point if you submitted your proposed corrections to the union?

The Witness: We did not.

Trial Examiner Whittemore: You went ahead and had it printed?

The Witness: We started the printing of it, yes.

Trial Examiner Whittemore: How do you consider that as being in furtherance of collective bargaining? I just question whether or not that fits into the picture. [46]

The Witness: Yes, it does. I consider that it does very much.

First, the unions have never requested us to change the form of the notice. They have attacked the right of the company to issue or distribute the notice. As a matter of fact, I think that in conferences they have attacked the right of the company to listen to individual grievances and apparently that is the position of the Board, but with respect to one of these issues, namely, whether or not we have negotiated, and whether or not we, by the terms or provisions of the notice, have intended or attempted to sabotage the union and degenerate its strength, by giving information to employees to the effect that might have the effect of creating in their minds that the union was not the collective bargaining agent of the employees so far as the grievances were concerned and that the company would handle

(Testimony of J. Stuart Neary.)

grievances alone, we attempted *to* good faith to amend the notice in those respects.

Trial Examiner Whittemore: Well, I would like to ask, then, as I understand it, the proposed changes have never been submitted to the union.

The Witness: That is correct.

Trial Examiner Whittemore: The union did not approve of any changes which you proposed?

The Witness: That is right. [47]

Trial Examiner Whittemore: Well, I will deny the offer to prove, permitting your offer to remain in the record.

If you wish to introduce that we will have it marked Respondent's Exhibit 1, and you may offer it.

The Witness: I do.

Trial Examiner Whittemore: Then I will reject it and it may be marked as a rejected exhibit in the rejected file.

The Witness: I offer this document, "Information to all employees; grievance procedure; North American Aviation, Inc., Inglewood, California; February 16, 1942," as Respondent's Exhibit 1, for identification. I am sorry that I haven't any other copies because that was the proof copy that came from the printer.

(Thereupon, the document referred to was marked as Respondent's Exhibit No. 1, for identification, and was rejected.)

(Testimony of J. Stuart Neary.)

RESPONDENT'S EXHIBIT No. 1

(Rejected)

February 16, 1942

INFORMATION TO ALL EMPLOYEES

Grievance Procedure

This bulletin supersedes the bulletin dated August 8, 1941, entitled, "Information For Employees—Grievance Procedure."

The agreement between North American Aviation, Inc., and United Automobile Workers of America, Aircraft Division, dated July 18, 1941, (copy of which you have received or will receive with this bulletin) sets forth in Article V and Article VI a procedure for presentation and adjustment of grievances by and through the representation of the union stewards and grievance committee. If employees desire this representation, you will follow the procedure outlined therein.

If employees desire to present grievances individually without representation, use the following procedure:

1. In the event of any dispute arising regarding the interpretation or application of any of the terms of the agreement, or any other request or grievance, there shall be no stoppage of work by any employee, and all such matters shall be adjusted according to the following procedure:

(Testimony of J. Stuart Neary.)

First: Between the employee presenting a grievance and his foreman;

Second: Between the employee presenting a grievance, if the matter is not satisfactorily settled with the foreman, and the factory manager or his authorized representative;

Third: Between the employee presenting a grievance, if the grievance is not satisfactorily settled by the factory manager, and the works manager or his authorized representative on that shift.

2. No case will be appealed from one of the above steps to the next higher step until after twenty-four (24) hours. In the event of the failure of the employee presenting a grievance to appeal any decision of a grievance, given at one step of the grievance procedure, within five working days of such decision, the case shall be considered closed on the basis of the decision so given.

There is no responsibility on the company to make an adjustment in any case unless presented within three days of its occurrence.

3. If any case is not satisfactorily adjusted by the employee presenting the grievance and the works manager or his authorized representative on that shift, it may be appealed to the general manager or his authorized representative within forty-eight hours. The general man-

(Testimony of J. Stuart Neary.)

ager or his representative will render his decision in writing to the employee presenting the grievance within forty-eight hours after the meeting if the decision was not given at the meeting.

4. Any of the periods within which any of the acts required in this notice are to be performed may be extended by mutual consent of the parties. In computing the time within which the acts herein are required to be performed, Saturdays, Sundays and holidays shall be excluded.

5. Minutes of the meeting between the employee presenting a grievance and management representatives will be kept, and copies of the minutes prepared by the management will be submitted to the employee presenting a grievance. After the minutes have been accepted by both parties, copies will be initialed by both parties for their permanent records.

6. The Company agrees that the employee presenting a grievance shall not be hindered, coerced, restrained or interfered with in the presentation and adjustment of such grievance or dispute, which presentation and adjustment shall be conducted on Company time.

It is understood that each employee has full time productive work to perform and that he will not leave his work during working hours, except when necessary, to present a grievance

(Testimony of J. Stuart Neary.)

under the procedure herein defined. If the employee presenting the grievance finds it necessary to make an investigation in order to properly present a grievance or dispute to the management he shall be granted, upon request, permission to leave his work for this purpose by his respective foreman or supervisor. He shall report to his foreman or supervisor the general nature of the grievance which he desires to investigate and again report to his foreman or supervisor upon his return to work in the department.

7. If any employee be discharged for any reason he shall be given the opportunity to present his grievance before leaving the plant.

8. In cases of disciplinary layoff or discharge of employees for infraction of shop rules or other misconduct which merits discipline, the employee shall have the right to seek modification or elimination of such penalty and compensation in whole or in part for lost wages on the ground that the employee was wrongfully disciplined or that the penalty was too severe for the offense involved, and such protest shall be handled according to the grievance procedure set forth herein, including the right of appeal to arbitration as provided hereinafter.

9. If a grievance or dispute is not satisfactorily settled and the employee requests that the

(Testimony of J. Stuart Neary.)

matter be submitted for settlement to arbitration, the Company agrees to submit the matter to arbitration, and it is understood and agreed that the decision of the arbitration board, as provided for hereinafter, shall be final and binding upon both parties.

10. The arbitration board shall consist of three persons: one chosen by the employee presenting the grievance; one chosen by the Company; and a third to be chosen by these two. No member of the board shall have any official, financial or other connection with or interest in either the Company or the employee presenting a grievance, or any associations with which he is affiliated. The Company and the employee presenting a grievance shall submit to each other the names of their respective representatives, and the two shall meet to choose the third member of said arbitration board within thirty-six hours after the request for arbitration has been made. If the Company and the employee representative cannot agree within seventy-two hours on a person to act as the third member of said board the Company and the employee representative shall request Dr. John R. Steelman, director of the Division of Conciliation of the Department of Labor, to submit a list of five persons qualified to act as the third member of said board. The employee representative and the company representative, after receipt of said list, shall each have the right to strike

(Testimony of J. Stuart Neary.)

two names from it in the following manner: the two representatives shall determine by lot the order of elimination and thereafter each shall in that order alternately eliminate one name until only one remains. The fifth or remaining name shall thereupon be accepted by both the employee presenting the grievance and the Company as the third member of said board. Said arbitration board shall thereafter meet as soon as possible to hear and adjust said grievance or dispute. Said board shall render its decision in writing not later than five days after it has taken the matter under submission.

11. The compensation and expenses of the third member of said board shall be borne equally by the Company and the employee presenting the grievance.

12. No grievance or dispute shall be presented for arbitration until the employee presenting the grievance has availed himself of the full procedure hereinbefore set forth, and all grievances or disputes shall be considered finally settled and not subject to arbitration unless within fifteen days from the date of receipt by the employee presenting the grievance or dispute of the decision of the general manager the employee presenting the grievance shall request in writing that the grievance or dispute be submitted to arbitration.

13. Before the submission of a grievance or



(Testimony of J. Stuart Neary.)

dispute for arbitration, the Company and the employee presenting the grievance shall set forth in writing specifically the issue or issues to be submitted to arbitration, and the arbitration board shall confine its decision to such stipulation of issue or issues.

14. It is understood that the arbitration board shall use every means to expeditiously present, consider and decide any and all matters submitted as herein provided, and the company and the employee presenting the grievance agree to facilitate the deliberations of said board in every way possible. Said board may call any employee as a witness in any proceeding before it, and the Company agrees to release said witness from work if he is on duty. If an employee witness is called by the Company, the Company will reimburse him for the time lost.

NORTH AMERICAN  
AVIATION, INC.

J. H. KINDELBERGER

President

Dated February 16, 1942.

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Mr. Kaplan: Do I understand you, Mr. Neary, to say that the proposed exhibit was never submitted to the union?

The Witness: That is correct.

Mr. Kaplan: That was a part of your offer of proof?

(Testimony of J. Stuart Neary.)

The Witness: Yes.

Trial Examiner Whittemore: It was in answer to a question that I put. I think the ruling upon that was given before your offer. As recall it, I asked you during that if you did offer it and let the record show that it has been offered [48] and rejected, and marked as designated.

The Witness: Any cross examination?

#### Cross Examination

Q. (By Mr. Jennings) Reserving my objection to this entire line of testimony, I would like to ask Mr. Neary whether or not before this notice was distributed to the employees there had been any discussion with the union, fixing the date more precisely, was there any discussion between July 18, 1941 and the date of the distribution of the notice about August 12, 1941 with any representative of the union with regard to distributing a notice which was distributed?

A. It is my understanding that there was not. However, Mr. Beaman would probably be better able to answer that question as to the company's position with respect to that. At that time the right of individual employees to present grievances individually had been negotiated between the parties and it was purely the administrative matter of notifying them of the procedure by which the management would receive and adjust those grievances. [49]

(Testimony of J. Stuart Neary.)

They didn't think that the union would have any interest, as a matter of fact, in the promulgation of the notice or the establishment of the procedure.

Q. Referring to another point, is it true that Section 10 of Article 5 of the contract, Board's Exhibit A, attached to the complaint, appearing on page 11, was a provision which was agreed upon by the parties after negotiations and as a compromise on different positions taken by the parties.

A. That is correct. If that isn't clear, I may state it this way: That in the negotiations the company took the position that the grievance procedure, as set forth in the contract, should provide clearly the procedure for individual employees bringing up grievances without union representation, as well as the procedure when employees desire the union representation; and we suggested that the wording show in all cases that it could be the individual employee or the district steward or the grievance committee, and the union did not desire that wording; as a matter of fact, the union objected to it.

The company representatives called to the attention of the union the fact that Section 9 (a) of the National Labor Relations Act required, or gave to the individual employees the right to present grievances. They admitted that they could not deprive them of that right. And I suggested, as a compromise, that the contract, especially Article 5, [50] contain provision for the presentation of grievances through union representatives and that that did

(Testimony of J. Stuart Neary.)

not deprive them of the right to individually present grievances. That language was accepted.

Q. It would be accurate to say that Section 10 was the culmination of a negotiation of the parties on that issue?

A. That is right, both parties agreeing that employees had the right under Section 9 (a) to present grievances, individually, without union representation.

Mr. Jennings: I should like to strike the last voluntary portion of the answer.

Mr. Peckham: It was in answer to his question, in direct answer, if the Examiner please.

Trial Examiner Whittemore: I will deny the motion to strike.

Mr. Jennings: To make the issue more precise, the article refers to the right to present grievances and there is nothing in the agreement, Exhibit A attached to the complaint, which confers on any employee the right to adjust or negotiate or bargain upon any grievance that he may present to the company.

Mr. Peckham: There is no contention that there was any bargaining by any individual employees here, or that this notice gave them any right to bargain. As I understand a grievance, Mr. Jennings, you don't bargain over a grievance. [51] If a man has a certain individual grievance you don't bargain. To bargain, in my estimation, seems to include something with reference to wages, hours, and

(Testimony of J. Stuart Neary.)

working conditions and grievances is an entirely different thing.

Trial Examiner Whittemore: I think that is a question which might better be included in the oral argument at the close.

Mr. Jennings: I simply wish to make clear my position.

Trial Examiner Whittemore: I think the language in the paragraph is very clear. I will permit him to give his interpretation. I shall permit other parties to give their interpretation of it as well.

Mr. Jennings: I should like at this time to renew my motion to strike any testimony relating to the negotiation of this clause of the contract upon the ground that the agreement speaks for itself; that oral evidence of any negotiation is entirely immaterial and inadmissible and in effect it is sought, by the oral evidence, to add to and alter and vary the terms and provisions of a written instrument between the parties, contrary, not only to the rules of evidence, but of the provisions of Article 12 of the contract itself.

The Witness: May I make a statement with respect to the motion to strike, and I will have to ask Mr. Jennings a question, if I may be permitted to do so in line with that. [52]

Is it your contention, Mr. Jennings, that you might agree that by the language of the contract the parties agreed that an individual employee could present a grievance, but that is all he could do?

Mr. Jennings: That is correct.

(Testimony of J. Stuart Neary.)

The Witness: He couldn't have it adjusted?

Mr. Jennings: No. The language of the contract says he can present the grievance, and the provisions of article 5 of the contract provide the manner in which it shall be adjusted. That is the answer, I think. No other procedure is necessary. He presents a grievance and it is settled and adjusted in a manner provided by the contract. I think that is very clear from the language of the contract itself.

Trial Examiner Whittemore: I will deny the motion to strike.

The Witness: Anything further?

Mr. Kaplan: I have no further questions.

(Witness excused.)

Mr. Neary: I think, Mr. Examiner, that if it is not inconvenient for yourself and the other parties that we could probably conclude within the next ten or fifteen minutes, if you would like to.

Trial Examiner Whittemore: That is agreeable to me.

Mr. Jennings: That would be fine.

Mr. Neary: Mr. Beaman, will you take the stand, please? [53]

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MARSHALL E. BEAMAN,

called as a witness by and on behalf of the respondent, having been first duly sworn, was examined and testified as follows:

(Testimony of Marshall E. Beaman.)

Direct Examination

Q. (By Mr. Neary) State your full name, Mr. Beaman.      A. Marshall E. Beaman.

Q. And your occupation?

A. I am director of industrial relations at North American Aviation.

Q. How long have you been so employed?

A. Since July 15, 1941.

Q. How was the notice, which is attached to the complaint as Exhibit B, given to the employees? By posting, or actual distribution?

A. It was distributed by the plant protection department, the plant policemen, to employees as they left work at the conclusion of their shift along with the copy of the contract, which is Exhibit A.

Q. And the new employees, subsequent to the first distribution, how was it given to them?

A. They are given a copy of the contract and a copy of the notice at the time of hire by the employment department personnel.

Mr. Jennings: Before you pass on, is a copy of the [54] contract or a copy of this notice posted on any bulletin board in the plant?

The Witness: I don't believe I can answer that. I am not sure. I know our main thought was to distribute it and I know we did distribute it and I don't think we posted it, but I can't make a definite statement to that effect. It was not ordered posted by the industrial relations department nor by Mr. Kindelberger.

(Testimony of Marshall E. Beaman.)

Q. (By Mr. Neary) Did you have any discussion with any representatives of the union between July 18, 1941 and August 12th, the date upon which this notice was distributed, with respect to, first, the distribution of the notice or, secondly, its form? A. No, I did not.

Q. Did you have any discussions with any representatives of the union subsequent to that time; that is, the date of distribution, with respect to the form of the notice or its distribution?

A. Yes.

Q. When did the first of those occur, approximately?

A. I would judge within two or three weeks following the distribution of the notice, it was discussed by the negotiating committee of the union and myself at a meeting, which had been called for another purpose, called to discuss grievances, which was shortly after the distribution. The exact date I [55] don't recall. However, it is a matter of record.

Q. At that time, in substance, what was the position of the union representatives?

A. The union representatives took the position that by the distribution of this notice we were attempting to inform the employees that that was the only grievance procedure and claiming that we were attempting to undermine the union, and things of a general nature of that kind.

Q. At that time had your grievance procedure been completely set up?



(Testimony of Marshall E. Beaman.)

A. At that time the grievance procedure, which is provided for in the contract, was only partly in operation due to the fact that we had not districted the plant and had not received an official list of stewards from the union and so on. Step two, as we speak of in the grievance procedure, the grievance procedure used when the union represents the employee; step two, which provides for the district steward and the factory manager or his representative to have a meeting on a grievance was inoperative.

Q. So you were meeting at that time with the grievance committee or negotiating committee of the union?      A. Weekly, right.

Q. Following a procedure which had been in operation prior to the execution of the contract?

A. Right. [56]

Q. That procedure was subsequently changed, was it not?

A. It was changed when we negotiated districting of the plant and the union assigned stewards to the various districts, which was some time in September.

Q. I show you herewith a letter dated August 19, 1941 addressed to Mr. J. H. Kindelberger and signed by Mr. Paul Lindsay on the letterhead of Aviation Division UAW-CIO; and ask you if you have ever seen that?      A. Yes, I have.

Q. Was that sent directly to you, or how did you receive it?

(Testimony of Marshall E. Beaman.)

A. Mr. Kindelberger referred the matter to me. In fact, I think I answered this letter. [57]

Mr. Neary: I ask that this be introduced as Respondent's Exhibit next in order.

Trial Examiner Whittemore: It may be marked as Respondent's No. 2 for identification and submitted to Mr. Jennings.

(Whereupon, the document referred to was marked as Respondent's Exhibit No. 2, for identification.)

Mr. Jennings: I object to the letter, Mr. Examiner, upon the ground that, as has been argued somewhat at length previously, any steps taken between the parties themselves to reach a determination as to the legality of the company's issuance of this notice, would be entirely immaterial because only the Board has the right and the power to determine whether this is an unfair labor practice.

Trial Examiner Whittemore: May I see the letter, please?

Mr. Jennings: I should like to add further, that, assuming, as I believe the Board has discretion in a case such as this to say that the party should exhaust the procedure provided by this contract, or to say that they should exhaust their procedure provided by their contract, as the Board's discretion might be exercised; that under the circumstances and facts of this case that discretion of the Board should certainly not be exercised to require the parties to submit to a private tribunal the question

(Testimony of Marshall E. Beaman.)

of violation of the National Labor Relations Act, such as the present one, which is not merely a question of fact but [58] a question of law which is entirely novel to my knowledge.

Trial Examiner Whittemore: Wouldn't you agree, Mr. Jennings, that this document is somewhat different than the material contained in the offer of proof with respect to any conference that Mr. Neary may have had with Mr. Walsh when the union was not present; that whether or not you feel that this has any bearing on the ultimate determination of the issue, that nevertheless if the respondent feels that any subsequent negotiations, which it had with the union on the point which is at issue, may or may not be relevant as to its determination, don't you feel this is in a somewhat different class than the conference which respondent may have had with the Board after the charge had been filed.

Mr. Jennings: Possibly in a different class, but I think it is still irrelevant to any issue in this proceeding.

Mr. Neary: One of the issues is the question of our refusal to negotiate, and this goes directly to the refusal to negotiate even assuming, which I do not admit, for the purpose of argument that the company's interpretation of its duty under the terms of the contract was wrong by its failure to negotiate prior to the distribution of the notice, yet, nevertheless, subsequent to that time when the matter came to the attention of the union and when

(Testimony of Marshall E. Beaman.)

the union raised the point under the provisions of Article 5, the company acceded to negotiation and did negotiate with the union [59] subsequent to that time.

Trial Examiner Whittemore: Well, might I not make this suggestion to save time? I don't think there is any necessity for going into all of the steps which may have followed the bringing of this matter to your attention by the union grievance committee.

Mr. Neary: No.

Trial Examiner Whittemore: I think it has already been stipulated, it seems to me that the notice as originally distributed remains the same and is still being distributed.

Mr. Neary: That is right.

Trial Examiner Whittemore: So that whatever may have come out of those negotiations, there has been no change in the document which the union first claimed was an unfair labor practice in the distribution of it, at least, and still maintains that it is. Now, wouldn't it be possible just to stipulate that here were on certain days certain conferences at which this particular point was discussed, simply, as background. It didn't result, it seems to me, in any change in the document, which is at issue here.

Mr. Neary: All that I intended to show by this letter was that the union did submit this dispute under the terms of Article 5 to the grievance procedure. The next letter I introduce is the com-

(Testimony of Marshall E. Beaman.)

pany's letter in answer to that. The next question I had to ask was: Did the union ever request [60] that this matter be submitted to arbitration according to Article 6 of the contract, and the answer will be "no," then I am through.

Trial Examiner Whittemore: In view of that, I am going to admit this in evidence over your objection as Respondent's Exhibit 2.

(Thereupon, the document heretofore marked for identification as Respondent's Exhibit No. 2, was received in evidence.)

RESPONDENT'S EXHIBIT No. 2

UAW

AVIATION DIVISION

CIO

402 Fox Wilshire Theatre Bldg.,  
202 South Hamilton Drive  
Beverly Hills  
California

Telephone

Webster 8103

August 19, 1941

Mr. J. H. Kindelberger  
Pres. North American Aviation, Inc.  
Imperial and Redondo Blvds.  
Inglewood, California

Dear Sir:

On Monday, August 18, 1941, the question of the leaflet put out by the North American Aviation,

(Testimony of Marshall E. Beaman.)

Inc., titled "Information for Employees, Grievance Procedure", over your signature, was taken up by the Union Grievance Committee with Mr. Beaman and Mr. Thayer; no satisfactory adjustment was reached.

Under Article 5, Paragraph 3 of the United Automobile Workers contract with North American Aviation, Inc., we are appealing the decision of the plant labor relations committee and request a meeting with you at your earliest possible convenience to discuss this question.

Yours truly,

(Sgd) PAUL LINDSAY

Chairman Grievance  
Committee—Rec.  
Sec. of Local 887

PL:dp

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Q. (By Mr. Neary) I show you here what purports to be a copy of a letter dated August 22, 1941, addressed to Paul Lindsey, Chairman of the Grievance Committee of the U.A.W.-C.I.O., and signed by J. H. Kindelberger by yourself as authorized representative, and ask you if you wrote that letter.

A. I did.

Q. Is that a true and correct copy of the original?

A. Yes.

Q. Was the original sent to Mr. Lindsey?

A. Yes.

(Testimony of Marshall E. Beaman.)

Q. At the address shown on the letter?

A. Yes.

Q. And is that in answer to the letter which we have just introduced as Respondent's Exhibit 2?

A. It is. [61]

Mr. Neary: I offer this as Respondent's next in order.

Trial Examiner Whittemore: Would you show it to counsel?

Mr. Jennings: The same objection, Mr. Examiner.

Trial Examiner Whittemore: Well, to whom is that directed?

Mr. Neary: Mr. Lindsey.

Trial Examiner Whittemore: Let's first find out whether it was received. That may make some difference as to whether or not it is admitted.

Mr. Jennings: It may be stipulated that the original was received by the union.

Mr. Neary: So stipulated.

Trial Examiner Whittemore: Then your objection is simply to its being irrelevant?

Mr. Jennings: That is correct; not to the lack of foundation.

Trial Examiner Whittemore: The objection is overruled and it is received as Respondent's Exhibit 3.

(Thereupon, the document above referred to was marked as Respondent's Exhibit No. 3, and was received in evidence.)

(Testimony of Marshall E. Beaman.)

RESPONDENT'S EXHIBIT No. 3

August 22, 1941

Paul Lindsay

Chairman, Grievance Committee

Recording *Section* of Local 887

Aviation Division UAW-CIO

402 Fox Wilshire Theatre Building

202 South Hamilton Drive

Beverly Hills, California

Dear Mr. Lindsay:

Replying to your letter dated August 19 concerning an appeal of the decision on your complaint of the distribution of the leaflet put out by North American Aviation, Inc., entitled "Information for Employees, Grievance Procedure," please be advised that Section 3, Article 5 of the N.A.A.-UAWA Contract provides that any case not satisfactorily adjusted by the plant grievance committee on the shift on which the grievance arose with the Management's representative on that shift may be appealed to the General Manager or his authorized representative and the grievance committee.

The particular case in question has been through the 4th step of the grievance procedure, and your meeting with Mr. Beaman and Mr. Thayer was the meeting provided for in this section.

As you undoubtedly remember, this was not a meeting provided for in Step 3 between the shift grievance committee and the Works Manager.



(Testimony of Marshall E. Beaman.)

Your committee consisted of Mr. A. Simpson, Mr. C. Quintard, Mr. J. Dye, and Mr. P. Lindsay, from the day shift, Mr. J. Hoffman and Mr. E. Dennington, from the night shift, and Mr. R. Althof, International Representative.

The decision given by the Management's representative at this meeting is the decision of Management. The distribution of the leaflet referred to was in no way contrary to the N.A.A.-UAWA Agreement dated July 1 and signed July 18, 1941.

Very truly yours,

NORTH AMERICAN  
AVIATION, INC.

J. H. KINDELBERGER

President

By W. E. BEAMAN

Authorized Representative

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Q. (By Mr. Neary) Did the union representatives, subsequent to August 22, 1941, ever request that the dispute with reference to the distribution of notice, which is Exhibit "B" attached to the complaint, be submitted to arbitration? [62]

A. No, they didn't.

Mr. Jennings: Same objection.

Trial Examiner Whittemore: Objection overruled.

Mr. Neary: I have no further questions.

Trial Examiner Whittemore: You don't have copies?

(Testimony of Marshall E. Beaman.)

Mr. Neary: No, I don't. I would like the privilege of submitting copies and withdrawing the originals. I can have that done this afternoon if the reporter would permit Mr. Peckham to take the copies and I will furnish sufficient copies for the other parties.

Mr. Jennings: We should have two copies of them in evidence. If you are able to find another copy of the rejected exhibit, I think that would be appreciated also.

Mr. Neary: We shall make an effort to do that.

Trial Examiner Whittemore: Very well.

Mr. Neary: Mr. Examiner, I don't think that anything will be gained by going over with Mr. Beaman the portion of my offer of proof. It is in there as an offer of proof both for the testimony of Mr. Beaman and myself.

Trial Examiner Whittemore: No; I understood that your offer was to include both such testimony as you might bring out and that Mr. Beaman might bring out.

Mr. Neary: And Mr. Peckham promised too that he would clear up that hiatus between the execution of the contract and the distribution of the notice; is that sufficiently clear [63] in your mind now?

Trial Examiner Whittemore: I think that is clear.

Mr. Neary: No further questions.

Trial Examiner Whittemore: All right. Mr. Jennings?

(Testimony of Marshall E. Beaman.)

Cross Examination

Q. (By Mr. Jennings) Do I understand you to say, Mr. Beaman, that the notice was distributed on August 12th before the grievance procedure, provided by the contract, had been completely set up?

Mr. Neary: May I have that question, please?

Trial Examiner Whittemore: Will you read the question?

(The question was read.)

The Witness: The grievance procedure, as provided in the contract, was not in operation as called for in the contract at that time due to the fact that we had not districted the plant and we had not received the official list of district stewards.

Mr. Neary: But there was a grievance procedure, was there not?

The Witness: Yes; there was a grievance procedure. It was complete except for step two as provided in the contract.

Mr. Neary: If I may make a statement that might clarify that, Mr. Jennings. We had a grievance procedure which was in operation prior to the execution of the contract which [64] provided, I believe, for weekly meetings, did it not, between the grievance committee and company representatives?

Mr. Lindsay: Yes.

Mr. Neary: Under the provisions of the contract district stewards were to be appointed by the

(Testimony of Marshall E. Beaman.)

union to represent certain geographical districts of the plant, and at the time that Mr. Beaman is speaking of that physical work had not been done; that is, the plant had not been divided into districts of so many employees to a district, nor had the union set up or nominated their stewards for each district; and for that reason step 2, as set forth in contract "B", Article 5, 1 (b) was not in operation, but a grievance procedure which both parties followed was in operation.

Q. (By Mr. Jennings) Did the company ever inform its employees that the procedure, as set forth in the notice, Exhibit "B", attached to the complaint, was not a substitute for the grievance procedure set forth in the contract, Exhibit "A", attached to the complaint.

A. There was no notification made except what was included in that notice.

Q. I assume that the company intended that their employees desiring to do so should use the grievance procedure set forth in the notice?

A. They felt that that was an individual matter for the employee to decide. [65]

Q. If he wished to do so, of course, you expected that he would use that procedure?

A. Why, if he wanted to handle his grievance individually, yes.

Q. Were any grievances excluded from those which could be handled in the manner set forth in the notice?

(Testimony of Marshall E. Beaman.)

A. Will you read the question, please.

(The question was read.)

The Witness: I don't quite understand what you mean.

Q. (By Mr. Jennings) Would any grievance of any sort or character whatsoever be handled under the procedure provided in the notice, Exhibit "B" attached to the complaint, assuming that the employee wanted to handle it in that fashion.

A. I think I would answer that this way: if an individual employee came to us with what he thought was a grievance, we would attempt to settle the thing. Many times, of course, we are approached with questions which they think are grievances, which are actually not grievances. We have that same question with the union. We might even discuss, in order to clarify in the individual employees mind the situation, things which are not grievances in the strict sense of the word.

Q. The point I am trying to make is this: were employees told that certain things could not be taken up under this procedure provided for by the notice?

A. No, they were not. They were only told what is in that notice. That is the only thing we have told them. [66]

Q. Then the answer would be, so far as you were concerned there was no limitation upon the nature of that type of grievance that might be

(Testimony of Marshall E. Beaman.)

taken up under either the procedure provided in the notice or in the procedure provided in the union contract?

A. There would be no limitation on discussing with the employee what he might want to discuss but, obviously, there would be limitations on what we might arrive at.

Mr. Jennings: That is all.

Q. (By Mr. Kaplan) I would like to ask two questions. All during those negotiations, Mr. Beaman, the company always took the position that it had the right to distribute Exhibit B, did it not?

A. That is right. We felt that right was given to us by section 10 of Article 5.

Q. Isn't it a fact, Mr. Beaman, that at some time during these meetings with the union's grievance committee, that you stated that the disposition of the company would not be changed because of the fact that the union had already filed a charge with the Labor Board?

A. At a meeting in January in Commissioner Malcom's office, Commissioner Malcom is connected with the United States Conciliation Service, this matter was discussed. At this meeting with representatives of the union and the company and Commissioner Malcom—— [67]

Q. Not to interrupt you, Mr. Beaman, but I asked you during your meeting with the grievance committee at the plant.

A. You didn't say "at the plant." No, I don't

(Testimony of Marshall E. Beaman.)

remember of saying that we wouldn't discuss it because it had been brought before the National Labor Relations Board at the plant. We have stated repeatedly, of course, that we thought that we had taken the correct stand. At this meeting in Malcom's office, which I was referring to, we did make the statement that a complaint had been filed with the National Labor Relations Board and we felt that wasn't the place to settle it or even discuss it.

Mr. Kaplan: That is all.

Q. (By Mr. Jennings) I didn't understand the last part of your answer. You say that wasn't the place to discuss it?

A. At Commissioner Malcom's office. We didn't feel it was a point in issue there. That wasn't why the meeting was called. The matter was brought up at which time it was pending before the National Labor Relations Board.

Q. (By Mr. Kaplan) That meeting at the Conciliation Service was brought about with respect to all of the various grievances that accumulated between the union and the company, and an attempt was made to dispose of all of those grievances at that time; isn't that so?

Mr. Neary: I object to that. [68]

The Witness: We did not——

Mr. Neary (Continuing): ——on the ground that it is leading and suggestive.

Mr. Kaplan: He is your witness.

(Testimony of Marshall E. Beaman.)

Mr. Neary: And improper cross examination to this extent: that Mr. Kaplan knows, he was present at the meeting, and I know that it was definitely understood that this was not a grievance hearing before Mr. Malcom. It was a meeting to attempt to see if the parties could not get together on certain interpretations of the contract, as Mr. Malcom expressed it to me. It was not in any sense of the word to be considered as a grievance hearing.

Mr. Kaplan: I have to disagree with Mr. Neary's version of that particular hearing because we went very specifically into a number of other grievances that were confronting the management and the union.

Trial Examiner Whittemore: I don't know that it is important what title the meeting was brought about. I will overrule your objection; so far as being leading, it is cross examination. However, this witness may interpret what he felt the meeting was and if you feel it was different, you can come back to the stand and testify, and Mr. Kaplan, who was present, can also give his interpretation. At the present time I don't see that it is particularly important.

Mr. Kaplan: I have no further questions of Mr. Beaman, [69] or is there a question pending?

Trial Examiner Whittemore: I don't know if the witness has answered.

Mr. Jennings: He hadn't answered.



(Testimony of Marshall E. Beaman.)

The Witness: I don't know what the question was now.

Trial Examiner Whittemore: Do you want to restate it?

Mr. Kaplan: I would rather have it re-read.

(The question referred to was read as follows:

“That meeting at the Conciliation Service was brought about with respect to all of the various grievances that accumulated between the union and the company, and an attempt was made to dispose of all of those grievances at that time; isn't that so?”)

The Witness: No.

Mr. Jennings: I haven't objected to this, Mr. Examiner, but in my view of the case the testimony offered by the union is equally irrelevant to the testimony offered by the company on the same topic; that is the effort of the parties to reach a private agreement on whether or not there was a violation of law.

Mr. Kaplan: We have no further questions.

Trial Examiner Whittemore: All right. Have you any further questions, Mr. Jennings?

Mr. Jennings: No. [70]

#### Redirect Examination

Q. (By Mr. Neary) I think we may have one or two questions here which I didn't ask before. This meeting you refer to was a meeting called by

(Testimony of Marshall E. Beaman.)

Commissioner Malcom of the United States Conciliation Service, connected with the Department of Labor; is that correct?      A. Yes.

Q. And you were present and representing the company; is that correct?

A. That is correct.

Q. Did you ask Mr. Malcom whether this was to be a grievance meeting?      A. I did.

Q. What did you say to Mr. Malcom?

A. I said in the first place——

Mr. Kaplan: We object to that because there was no representative of the union there. It is purely hearsay so far as the union is concerned.

Q. (By Mr. Neary) Who was present at that meeting besides yourself and Mr. Malcom?

Mr. Kaplan: Go ahead.

The Witness: Mr. Kaplan, Mr. Lindsay, Mr. Postma.

Q. (By Mr. Neary) This conversation took place when all of us were present?

A. That is right. [71]

Q. State what the conversation was.

A. I will have to give a little background for it.

In the first place, Mr. Malcom called me and later confirmed it by letter that he had been requested by the union to get together with us, representatives of the company, to discuss certain matters relative to the contract. When the meeting was first called together in Mr. Malcom's office, one of the first requests I made in questions I asked was

(Testimony of Marshall E. Beaman.)

whether or not this was a meeting to supersede the grievance procedure as contained in the contract. Mr. Malcom stated very definitely that it was not and that he did not care to discuss any individual grievances which had not been handled through the grievance procedure. We did discuss many issues and Mr. Malcom refused to discuss any individual grievances which the union had there which had not been put through the grievance procedure.

Mr. Neary: That is all.

Trial Examiner Whittemore: Any further questions?

Mr. Kaplan: No questions.

Q. (By Trial Examiner Whittemore) I have just one or two questions here: Did the company ever distribute the copies of the contract to all of the employees?

A. Yes; they distributed those at the same time they distributed the notice, the same day, the same time.

Q. Were they likewise given to each new employee? [72]      A. Right.

Q. Prior to the issuance of this notice as to the individual treatment of the grievance procedure, within your knowledge as to their past record, at least, do you know if the company has ever distributed a similar notice?

A. Not to my knowledge.

Q. To its employees?

A. Not to my knowledge.

(Testimony of Marshall E. Beaman.)

Trial Examiner Whittemore: I think that is all.

Mr. Kaplan: Just one question, Mr. Examiner. Did the company post any copies of the agreement on any of the bulletin boards?

The Witness: I can't say. To my knowledge neither the agreement nor the notice was posted on company bulletin boards. It was given to everybody.

Mr. Jennings: Every employee was given a copy?

The Witness: Every employee was given a copy of each.

Mr. Kaplan: That is all so far as Mr. Beaman is concerned.

Trial Examiner Whittemore: Is that all?

Q. (By Mr. Neary) Just one question: Have you any record, Mr. Beaman, of the number of grievances, if any, that have been handled under the procedure of this notice, Exhibit B?

Mr. Jennings: That is objected to as immaterial.

The Witness: I can't say how many off-hand—— [73]

Trial Examiner Whittemore: Just a moment. Wait until I rule on the objection. I assume that this is simply a preliminary question, so far it is simply whether or not there is any record.

Mr. Neary: That is right.

Trial Examiner Whittemore: Of such handling.

Mr. Neary: That is right.

(Testimony of Marshall E. Beaman.)

Trial Examiner Whittemore: I assume you will follow that up with how many there are.

Mr. Neary: That is correct.

Trial Examiner Whittemore: So I would like to know what relevancy that has.

Mr. Neary: It probably hasn't a great deal. I don't know whether I am correct or not but it is my understanding that very few grievances have been handled in this manner and quite a number through the manner set forth in the contract. And it would go to answer the question as to whether or not there was any misunderstanding on the part of the employees that this procedure superseded the procedure set forth in the contract or was considered more desirable by the company, as has been contended by the Board and by the union in their discussion.

Trial Examiner Whittemore: I don't think the number is at all relevant. It would have to be relative anyway, then we would go into a statistical question here which might [74] change this afternoon and might change tomorrow morning. I think that if you are willing to withdraw that question, I would permit a question as to whether or not there have been grievances taken up in the manner outlined in this notice, and simply let it go at that.

Would you have any objection to that fact being in the record, if it is a fact?

Mr. Jennings: I will object to that as being immaterial.

(Testimony of Marshall E. Beaman.)

Mr. Neary: I don't think that that is sufficient so I would object to asking that question.

Trial Examiner Whittemore: Well, you would have to establish first that there had been taken up some cases before you can establish how many, it seems to me.

Mr. Neary: But the condition of your request is that we let it go at that and if that is the condition, I will object to it.

Mr. Jennings: This is more or less my idea: Supposing that we go so far as to say this was an unfair labor practice and designed to undermine and so on and so forth. If it was and it was unsuccessful, I don't suppose that alters the nature of the offense or the extent of it.

Trial Examiner Whittemore: I think what I would suggest we do in this case, I don't see the relevancy of any number; we might have to go into a long exploration here in order to determine whether or not there was any basis for your [75] statement that there was comparatively few. So that if you want to make an offer of proof, why, I suggest that can be the best way of handling it.

Mr. Neary: Might I speak with Mr. Beaman in private for a moment?

Trial Examiner Whittemore: Yes.

(Conference between counsel and witness.)

Mr. Neary: If the objection is sustained, I make an offer of proof, and let the record show that two grievances have been handled according to the pro-

(Testimony of Marshall E. Beaman.)

cedure set forth in the notice, Exhibit B, and over 800 presented and adjusted according to the procedure set forth in articles 5 and 6 of the contract.

The respondent rests.

Trial Examiner Whittemore: Very well. Do you wish to be heard on his offer of proof?

Mr. Jennings: Well, of course, the objection was sustained to the question. He made the offer of proof and, of course, I would still object to the receipt of the evidence.

Trial Examiner Whittemore: I don't know but what the relativity of the member would cause you to change your mind, but it appears it doesn't. I will deny the offer of proof and it may remain in the record. You have no further questions?

Mr. Neary: The respondent rests.

Q. (By Trial Examiner Whittemore) I would like to simply [76] ask the witness again, or rather ask him the question which I suggested you substitute for the one you did put: 'This procedure outlined in this notice, which is in question, has been in operation, has it not?

A. That is right.

Q. And it has not been withdrawn and is still being distributed to new employees?

A. That is correct.

Trial Examiner Whittemore: Have you any further questions, Mr. Kaplan?

Mr. Kaplan: No further questions.

Mr. Neary: The respondent rests.

(Testimony of Marshall E. Beaman.)

Trial Examiner Whittemore: Then you are excused.

(Witness excused.)

Trial Examiner Whittemore: Have you any witnesses, Mr. Kaplan?

Mr. Kaplan: Yes. Well, Mr. Examiner, we have one witness to testify on just one small matter. I think it is a question that will take about two minutes.

Trial Examiner Whittemore: Do you want to put him on?

Mr. Kaplan: Yes.

Mr. Neary: Do you want to offer a stipulation on it?

Trial Examiner Whittemore: Off the record for a moment.

(Discussion off the record.) [77]

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PAUL LINDSAY,

called as a witness by and on behalf of the National Labor Relations Board, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Jennings) What is your full name, please?

A. Paul Lindsay.

Q. Where are you employed?

A. North American Aviation.



(Testimony of Paul Lindsay.)

Q. How long have you been employed there?

A. Approximately three years.

Q. Do you hold any office in the union?

A. President of the local.

Q. Have you been working in the present plant since August the 12th of 1941? A. I have.

Q. How much of the time since August 12th have you been working in the plant, or on union business? A. The entire time.

Q. Are there bulletin boards in the company plant at Inglewood? A. There are.

Q. And are there union bulletin boards or company bulletin boards? A. There are both. [78]

Q. Have you noticed or seen copies of the grievance procedure or notice to employees, Board's Exhibit A, attached to the complaint, or B attached to the complaint, posted on the company's bulletin boards?

A. I have seen this on several boards in various departments.

Q. Have you seen posted with the notice, copies of the contract between the union and the company, Board's Exhibit A attached to the complaint?

A. No.

Mr. Neary: Will you read that question?

(The question was read.)

Mr. Neary: I don't know what difference it makes whether they were posted together or not. Go ahead.

Mr. Jennings: That is all.

(Testimony of Paul Lindsay.)

Cross Examination

Q. (By Mr. Neary) What bulletin boards did you see this posted on, Mr. Lindsay?

A. Well, as I recall on one place in 36.

Q. Department 36?

A. What would be department 36, and in my own department, department 1.

Q. Where are those bulletin boards located?

A. Well, they have been changed from time to time.

Q. I am talking about the bulletin board on which you saw [79] this notice posted. Where was it when you saw the notice posted? Describe its location.

A. Well, always near the clock.

Q. The time clock? A. The time clock.

Q. The time clock in department 36?

A. The one in 36 more probably on the——

Q. I don't want to know where it probably was; I want to know where it was you saw it.

A. Well, they have changed the location around there several times but at the time it was on——

Q. I just want your best recollection.

A. The best recollection I have, it was on the side of the tool crib or the tool control crib. [80]

Q. In Department 36?

A. As I remember it.

Q. Where was the one in 1?

A. Near the time clock.

Q. When did you see the notices on these bulletin boards?

(Testimony of Paul Lindsay.)

A. Well, I would say along the latter part of August or the first of September. I couldn't tell you just when.

Q. Have you seen them continuously since that time?

A. No. The Boards are covered up from time to time with other notices.

Q. How long was the one posted in Department 36?

A. That I couldn't say.

Q. How long was it posted in 1?

A. I couldn't tell you.

Q. That was the only posting you ever saw; is that right?

A. The only definite ones I recall.

Q. You don't know whether that was posted by the company or not or any of the representatives?

A. Well, I have reason to believe that if it hadn't been it would have been removed by the officers who watch those things very close down there.

Q. You didn't see it after a time, did you?

A. After quite a time, yes.

Q. How long a time?

A. Well, I couldn't say definitely how long but it was the [81] usual thing. You go there and they get to be a habit. I don't know when it was taken off.

Q. But you couldn't say of your own knowledge that this bulletin was posted by the company or any of its representatives?

(Testimony of Paul Lindsay.)

A. As I stated before, I have reason to believe that it was because of any notice——

Q. Of your own knowledge. Will you listen to the question?      A. I heard your question.

Q. Did you see any representative of the company post this bulletin?      A. I did not.

Q. Did any representative of the company tell you he posted it or another representative of the company posted it?      A. No.

Mr. Neary: That is all.

Q. (By Mr. Kaplan) I would like to ask one question: Did you ever have any copies of Exhibit “B” in your possession?

A. I was handed one, I believe, the first trip I made into the plant after I came back from leave of absence.

Mr. Kaplan: That is all.

Trial Examiner Whittemore: Were you given a copy of the contract at the same time?

The Witness: Yes; I was.

Mr. Kaplan: I believe that is all. [82]

Trial Examiner Whittemore: You are excused.

(Witness excused.)

Trial Examiner Whittemore: Do you have any other witnesses, Mr. Kaplan?

Mr. Kaplan: No.

Trial Examiner Whittemore: Any questions in rebuttal, Mr. Jennings?

Mr. Jennings: I think not, Mr. Examiner.

Trial Examiner Whittemore: Suppose we take

a two or three minute recess and then return, or would Mr. Jennings desire to state first what his position is.

Mr. Jennings: Yes.

Trial Examiner Whittemore: Very well. Then before we bring the hearing to a close, I should like to hear from each counsel, as I suggested I would do at the opening of the hearing, as to his respective position to the issues, and what has been proved. [83]

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In the United States Circuit Court of Appeals  
for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,  
Petitioner,

v.

NORTH AMERICAN AVIATION, INC.,  
Respondent.

CERTIFICATE OF THE NATIONAL LABOR  
RELATIONS BOARD

The National Labor Relations Board, by its Executive Secretary, duly authorized by Section 1 of Article VI, Rules and Regulations of the National Labor Relations Board—Series 2, as amended, hereby certifies that the documents annexed hereto constitute a full and accurate transcript of the entire record in a proceeding had before said Board en-

titled, "In the Matter of North American Aviation, Inc., and United Automobile, Aircraft and Agricultural Implement Workers of America, Local 887, C.I.O.," the same being Case No. C-2198, before said Board, such transcript including the pleadings, testimony and evidence upon which the order of the Board in said proceeding was entered, and including also the findings and order of the Board.

Fully enumerated, said documents attached hereto are as follows:

(1) First amended charge filed by United Automobile, Aircraft and Agricultural Implement Workers of America, Local 887, C.I.O., sworn to April 11, 1942, together with respondent's information for employees on grievance procedure.

(2) Complaint, together with exhibits A and B, and notice of hearing issued by the National Labor Relations Board, April 15, 1942.

(3) Respondent's answer to complaint.

(4) Certified copy of order designating Charles W. Whittemore, Trial Examiner for the National Labor Relations, dated April 23, 1942.

Documents listed hereinabove under items 1-4, inclusive, are contained in the exhibits and included under the following item:

(5) Stenographic transcript of testimony before Trial Examiner Whittemore on April 27, 1942, together with all exhibits introduced into evidence.

(6) Copy of Intermediate Report of Trial Examiner Whittemore, dated May 20, 1942.

(7) Copy of order transferring case to the Board, dated May 22, 1942.

(8) Copy of respondent's telegram, dated June 10, 1942, requesting oral argument.

(9) Copy of respondent's telegram, dated June 17, 1942, requesting extension of time to file brief.

(10) Copy of telegram, dated June 18, 1942, granting all parties extension of time to file exceptions and brief.

(11) Copy of respondent's exceptions to the Intermediate Report.

(12) Copy of union's telegram, dated June 26, 1942, requesting oral argument.

(13) Copy of notice of hearing for purpose of oral argument, dated June 30, 1942.

(14) Copy of list of appearances at oral argument held before the Board, July 14, 1942.

(15) Copy of decision, findings of fact, conclusions of law and order issued by the National Labor Relations Board September 29, 1942, together with affidavit of service and United States Post Office return receipts thereof.

In Testimony Whereof the Executive Secretary of the National Labor Relations Board, being thereunto duly authorized as aforesaid, has hereunto set her hand and affixed the seal of the National Labor Relations Board in the city of Washington, District of Columbia, this 16th day of November, 1942.

[Seal]

BEATRICE M. STERN,

Executive Secretary,

National Labor Relations  
Board.

[Endorsed]: No. 10313. United States Circuit Court of Appeals for the Ninth Circuit. National Labor Relations Board, Petitioner, vs. North American Aviation, Inc., Respondent. Transcript of Record. Upon Petition for Enforcement of an Order of the National Labor Relations Board.

Filed November 23, 1942.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

---

[Title of Circuit Court of Appeals and Cause.]

STATEMENT OF POINTS UPON WHICH  
PETITIONER INTENDS TO RELY

To the Honorable, the Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Comes now the National Labor Relations Board, petitioner in the above proceeding, and in conformity with the revised rules of this Court heretofore adopted, hereby states the following points as those upon which it intends to rely in this proceeding:

1. Upon the undisputed facts respondent has engaged and is engaging in unfair labor practices within the meaning of Section 8 (1) and (5) of the National Labor Relations Act.

2. The Board's order is wholly valid and proper under the Act.



Dated at Washington, D. C., this 17th day of November, 1942.

NATIONAL LABOR RELATIONS BOARD

By ERNEST A. GROSS,  
Associate General Counsel.

[Endorsed]: Filed Nov. 24, 1942.

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[Title of Circuit Court of Appeals and Cause.]

STATEMENT OF POINTS UPON WHICH  
RESPONDENT INTENDS TO RELY

To the Honorable Chief Justice and Associate Justices of the United States Circuit Court of Appeals for the Ninth Circuit:

Comes now the Respondent, North American Aviation, Inc., and in conformity with the rules of this court hereby states the following points as those upon which it intends to rely in this proceeding:

1. The order of the Board is improper, void and in excess of the jurisdiction of the Board.

2. There was no proof before the Board that any act complained of constituted an unfair labor practice on the part of Respondent or interfered with or restrained or had a tendency to interfere with or restrain, commerce.

3. The decision of the Board is based upon assumed issues and charges which are entirely beyond the allegations of the complaint and without basis in the evidence.

4. The decision is in conflict with the proviso of Section 9(a) of the National Labor Relations Act granting to individual employees or minority elements the right of individual presentation of grievances. The right of presentation of grievances implies the right to obtain adjustment thereof, even by arbitration when necessary.

5. The decision is in violation of the provisions of the contract between Respondent and the Union providing for individual grievance presentation and also providing for settlement by arbitration of any grievance or dispute with respect to the interpretation or application of any of the terms of said contract.

6. The order of the Board is too broad. The sole issue was the propriety of the particular notice given by the employer with respect to individual grievance presentation. There is no issue and no proof of any refusal to bargain collectively.

Dated: Los Angeles, California, December 1, 1942.

GIBSON, DUNN & CRUTCHER

By J. STUART NEARY

Attorneys for North American  
Aviation, Inc.

IRA C. POWERS

Of Counsel.

Copy mailed to Attorney for Petitioner Dec. 11, 1942.

[Endorsed]: Filed Dec. 12, 1942.

No. 10313

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**In the United States Circuit Court of Appeals  
for the Ninth Circuit**

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**NATIONAL LABOR RELATIONS BOARD, PETITIONER**

**v.**

**NORTH AMERICAN AVIATION, INC., RESPONDENT**

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**ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD**

---

**BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD**

---

**ROBERT B. WATTS,**

*General Counsel,*

**ERNEST A. GROSS,**

*Associate General Counsel,*

**HOWARD LICHTENSTEIN,**

*Assistant General Counsel,*

**DAVID FINDLING,**

**HARLEY MOORHEAD, Jr.,**

*Attorneys,*

*National Labor Relations Board.*

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**FILED**

**FEB 15 1943**

**PAUL P. O'BRIEN,**  
**CLERK**



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**In the United States Circuit Court of Appeals  
for the Ninth Circuit**

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No. 10313

NATIONAL LABOR RELATIONS BOARD, PETITIONER

*v.*

NORTH AMERICAN AVIATION, INC., RESPONDENT

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*ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD*

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**BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD**

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**JURISDICTION**

This case is before the Court upon petition of the National Labor Relations Board for enforcement of its order issued against respondent pursuant to Section 10 (c) of the National Labor Relations Act (49 Stat. 449, U. S. C. Supp. V, Title 29, Sec. 151, *et seq.*).<sup>1</sup> The jurisdiction of this Court is based upon Section 10 (e) of the Act. Respondent, a Delaware corporation, transacts business at Inglewood, County of Los Angeles, California, where the unfair labor practices occurred.

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<sup>1</sup> Pertinent provisions of the Act are set forth in the Appendix, *infra*, pp. 31-33.

## STATEMENT OF THE CASE

Upon an amended charge duly filed by United Automobile, Aircraft and Agricultural Implement Workers of America, Local 887, C. I. O. (herein called the Union), and following the usual proceedings pursuant to Section 10 of the Act, the Board, on September 29, 1942, issued its findings of fact, conclusions of law, and order (R. 47-70; 44 N. L. R. B., No. 113), which may be briefly summarized as follows:

1. *Nature of respondent's business* (R. 52-53).—Respondent owns and operates at Inglewood, California, a plant for the manufacture of aircraft and aircraft parts and accessories. During 1941, respondent purchased raw materials valued at more than \$17,000,000, and sold aircraft and aircraft parts and accessories produced by it, valued at more than \$69,500,000. Of these, raw materials valued at more than \$15,300,000 and finished products valued in excess of \$62,550,000, moved in interstate commerce to and from respondent's plant.<sup>2</sup>

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<sup>2</sup> Upon these findings, based upon a stipulation of counsel, the Board's jurisdiction is clear, as respondent concedes (R. 27-28). *N. L. R. B. v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, and companion cases. Respondent contended before the Board that the Board nevertheless "cannot" find that respondent violated the Act, because a current contract between respondent and the Union prohibited strikes or lock-outs during its term (Resp. brief to Board, pp. 25-28). Accordingly, respondent argued, the unfair labor practices alleged in the complaint to have been committed by it, could not be said to lead or tend to lead to labor disputes burdening or obstructing commerce or the free flow of commerce, within the meaning of the Act (Sections 2 (7) and 10 (a)). The contention is without merit, as the Board found (R. 50, note).

That the unfair labor practices involved in the instant case, like



2. *Respondent's unfair labor practices* (R. 53-65).— During the term of a collective bargaining agreement between respondent and the Union, in which the Union was recognized as the exclusive collective bargaining representative of the employees and which contained a provision establishing a procedure for settlement of grievances, respondent, without consultation with the Union, issued a notice to its employees, suggesting that it was “company policy” to settle grievances directly with employees individually, and establishing a separate procedure (which respondent thereafter put into operation over the Union’s protests) for the disposition of grievances thus presented. Respondent thereby refused to bargain collectively with the Union as the exclusive representative of the employees, with—

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the others defined in the Act, are prolific causes of industrial strife which traditionally tends to cripple and halt the business operations of the employer involved, is a matter settled by the Congressional findings enunciated in Section 1 of the Act, and not open to challenge. *N. L. R. B. v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 42, 43. Under the Act, the Board is given “exclusive” power to prevent such unfair labor practices, and it is explicitly provided that this power “shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement \* \* \* or otherwise” (Section 10 (a)). Accordingly, it is clear that the agreement between respondent and the Union in the instant case, purporting to prevent all obstructions to commerce, cannot “affect” the Board’s power to prevent obstructions which, as Congress found, traditionally result from the practices proscribed by the Act. Cf. *N. L. R. B. v. Newark Morning Ledger Co.*, 120 F. (2d) 266 (C. C. A. 3), cert. den., 314 U. S. 693. Moreover, the contention erroneously assumes, contrary to general experience, that the agreement between respondent and the Union is a guarantee against interruptions to commerce, merely because that is its objective. See, e. g., *N. L. R. B. v. Highland Shoe, Inc.*, 119 F. (2d) 218, 222 (C. C. A. 1).

in the meaning of Section 8 (5) of the Act, and interfered with, restrained, and coerced its employees in the exercise of their right to self-organization and to bargain collectively, in violation of Section 8 (1) of the Act.

3. *The Board's order* (R. 68-70).—The Board ordered respondent to cease and desist from its unfair labor practices; upon request, to bargain collectively with the Union as the exclusive representative; to inform the employees that the notice above-described is null and void and that respondent will give no effect to the grievance procedure established therein; and to post and maintain appropriate notices of compliance with the Board's order.

#### SUMMARY OF ARGUMENT

I. Upon the undisputed facts respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (1) and (5) of the National Labor Relations Act.

II. The Board's order is wholly valid and proper under the Act.

#### ARGUMENT

##### POINT I

**Upon the undisputed facts respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (1) and (5) of the National Labor Relations Act**

The facts in this case are substantially undisputed. The sole question is whether the Board's conclusion from these facts, that respondent had violated Section

8 (1) and (5) of the Act, is permissible. We shall first set out the pertinent facts found by the Board and shown by the record, and then demonstrate that upon these facts, the Board's conclusion as to respondent's unfair labor practices is proper.

#### A. The undisputed facts

On July 18, 1941, following certification of the Union by the Board as the exclusive collective bargaining representative of all of respondent's employees in an appropriate unit (29 N. L. R. B. 148; 30 N. L. R. B. 1196), respondent and the Union entered into a collective bargaining agreement.<sup>3</sup> In the agreement, respondent recognized the Union as the exclusive bargaining agent of all of the employees in the appropriate unit, and the Union was explicitly described therein as "acting for and on behalf of" all such employees (R. 6, 8). The contract contained provisions covering wages, hours, seniority, vacations, safety conditions, use of bulletin boards, and other matters normally the subject of collective bargaining agreements, including a grievance procedure and provision for arbitration.

The article concerning grievance procedure provided, in pertinent part, as follows (R. 11-15):

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<sup>3</sup> The Board's certification and the contract are in the name of a predecessor local of the Union, but no question is raised as to the Union's right of successorship (R. 90-91). Nor is there any issue as to the propriety of the Board's certification and the Union's continuing majority status in the unit, which consists, generally, of all production and maintenance workers with certain exceptions.

## ARTICLE V

## Grievance Procedure

(1) In the event of any dispute arising regarding the interpretation or application of any of the terms of this agreement or any other request or grievance there shall be no stoppage of work by any employee, and all such matters shall be adjusted according to the following procedure:

(a) Between the aggrieved employee and his foreman or with his representative and his foreman.

(b) Between the district steward and the factory manager or his authorized representative.

(c) Between the plant grievance committee of the shift and the works manager or his authorized representative on that shift.

\* \* \* \* \*

(3) If any case is not satisfactorily adjusted by the plant grievance committee on the shift on which the grievance arose, with the management's representative of that shift, it may be appealed to the general manager or his authorized representative, and the grievance committee, within forty-eight (48) hours of such written appeal. The general manager or his representative will render his decision in writing to the chairman of the grievance committee within forty-eight (48) hours after the meeting with the committee if the decision was not given at the meeting.

\* \* \* \* \*

(10) No provision of this Article shall be interpreted to prevent any employees or group of

employees from presenting grievances to the management in accordance with the provisions of Section 9 (a) of the National Labor Relations Act.<sup>4</sup>

The article concerning arbitration provided, in part, as follows (R. 15-18):

## ARTICLE VI

### Board of Arbitration

(1) If a grievance or dispute with respect to the interpretation or application of any of the terms of this Agreement is not satisfactorily settled, either party to this contract shall request that the matter be submitted for settlement to arbitration. If such request is made, the other party shall also agree to submit the matter to arbitration, and it is understood and agreed that the decision of the Arbitration Board, as provided for in this Article, shall be final and binding upon both parties, and therefore it is agreed that during the term of this Agreement the Union or its members shall not call or engage in, sanction, or assist in, any sympathy or other strike against, or any slow-down or stoppage of work, of the Company,

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<sup>4</sup> Other subdivisions of the article relate to various details of the grievance procedure, not relevant to the issues in the case. Section 9 (a) of the Act provides that:

“Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer.”

and the Union will require its members to perform their services for the Company when required by the Company to do so, and during the term of this Agreement the Company shall not cause or permit any lockout of the members of the Union.

\* \* \* \* \*

(4) No grievance or dispute shall be presented for arbitration until either the Company or the Union has availed itself of the full procedure set forth in Article V hereof and all grievances or disputes shall be considered finally settled and not subject to arbitration unless within fifteen (15) working days from the date of receipt by the Union of the decision of the management as specified in Article V, subsection 3, the Union shall request in writing that the grievance or dispute be submitted to arbitration.

On August 12, 1941, less than a month after the signing of the agreement, and before the grievance procedure provided in the collective bargaining agreement had been put into operation,<sup>5</sup> respondent distributed to each of its employees in the unit covered by the contract, a copy of the agreement and also a copy of a notice, suggesting that it was "company policy" to deal with the employees directly, and announcing a separate grievance procedure by which employees could present grievances individually (R. 103, 124, 135). This notice was as follows (R. 21-22):

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<sup>5</sup> The plant had not yet been divided into the various districts required under the grievance procedure (R. 135-136).

## INFORMATION FOR EMPLOYEES

## GRIEVANCE PROCEDURE

In accordance with the National Labor Relations Act and the policy of North American Aviation, Inc., every employee has the privilege of presenting his grievance directly to the Management.

In order that this procedure may be known to employees, the following steps are outlined:

1. Employees must first take up the matter with their Foreman. If a satisfactory settlement is not reached, the employee may request the presence of a member of the Industrial Relations Department who will help in attempting to adjust the matter.

2. If the complaint is not adjusted satisfactorily, a member of the Industrial Relations Department will arrange a hearing with the Works Manager or his representative.

3. Should the decision of the Works Manager not be satisfactory to the employee, he may, if he so desires, present a written appeal to the President of the Company. The Industrial Relations Department will assist the employee in arranging for the presentation of his case.

4. Should the decision of the President not be satisfactory, and the employee so desires, the matter may be submitted to outside arbitration in a manner mutually acceptable to both the employee and the Company.

The Industrial Relations Staff is available to all employees who may desire information or assistance with respect to their rights or

privileges under either *company policy* [italics supplied] or collective bargaining. Employees desiring to contact the Industrial Relations Department may call at the following hours Monday through Friday:

First Shift—At the conclusion of the shift.

Second Shift—Before shift starts work.

Third Shift—Third shift employees shall ask their Foreman to make arrangements for an appointment. Such matters will receive prompt attention.

NORTH AMERICAN AVIATION, INC.  
J. H. KINDELBERGER, *President*.

The notice was promulgated and distributed without prior notice to or consultation with the Union (R. 118, 124). Since August 12, respondent has continued to distribute such notices and copies of the trade agreement to all new employees, despite the Union's protests (R. 147). Respondent had never previously issued notices to its employees advising them of any formal procedure for the presentation of individual grievances (R. 143).

Following the distribution of the notices, the procedure therein outlined was put into operation at respondent's plant, and, in at least two instances, has actually been invoked by individual employees in the appropriate unit (R. 146-147).<sup>6</sup> Respondent's per-

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<sup>6</sup> Despite respondent's establishment of the separate procedure, an overwhelming number of the employees nevertheless used the grievance machinery established by the trade agreement (R. 146-147). The circumstance that respondent's conduct thus did not succeed in luring more than very few of the employees from use of the collective bargaining machinery does not, of course, affect its illegality under the Act. Cf., e. g., *N. L. R. B. v. Link-*



sonnel director testified that the employees have not been notified of any limitation upon the nature or type of grievances that might be submitted under the individual grievance procedure, and, further, that "there would be no limitation on discussing with the employee what he might want to discuss" (R. 137-138). While he also testified that, "obviously, there would be limitations on what we might arrive at" (*ibid.*), he did not state what these "limitations" might be, and so far as appears from the record, limitations were never formulated.<sup>7</sup>

**B. Upon these facts, the Board properly found that respondent violated Section 8 (1) and (5) of the Act**

Upon the foregoing facts, the Board found that respondent, "by the issuance of the notice of August 12, 1941, and by the establishment of the grievance procedure described therein," refused to bargain collectively with the Union as the exclusive representative of the employees, and interfered with, restrained,

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*Belt Co.*, 311 U. S. 584, 588; *N. L. R. B. v. A. S. Abell Co.*, 97 F. (2d) 951, 956 (C. C. A. 4); *Rapid Roller Co. v. N. L. R. B.*, 126 F. (2d) 452, 457 (C. C. A. 7), cert. den., 63 S. Ct. 45; *Bethlehem Steel Co. v. N. L. R. B.*, 120 F. (2d) 641, 653 (App. D. C.).

<sup>7</sup> On February 16, 1942, after the Union had filed charges with the Board, respondent, again without notice to or consultation with the Union, promulgated further notices which modified in certain respects the language of the statement of August 12 and provided a substitute procedure for presenting individual grievances (R. 109-118). These notices, however, were never distributed to the employees, as respondent claimed, because the Board issued its complaint herein, and the new procedure was never put into effect (R. 107-108). Accordingly, the legality of respondent's conduct must be determined by the August 12 notice, which is the only one in operation so far as the employees are aware.

and coerced the employees in the exercise of the rights guaranteed in Section 7 of the Act, thereby engaging in unfair labor practices in violation of Section 8 (1) and (5) of the Act (R. 65). The sole issue is whether, as the Board found (R. 59-65), after a grievance procedure had been established by agreement between respondent and the Union as the exclusive collective bargaining representative of all the employees, respondent was not free unilaterally to establish, as it did, a separate grievance procedure for the adjustment of grievances presented individually by the employees; or whether, as respondent contends, the proviso to Section 9 (a), which states that "any individual employee or a group of employees shall have the right at any time to present grievances to their employer,"<sup>8</sup> impliedly carries with it the right of an employer unilaterally to establish such separate grievance procedure.

We submit that the Board's holding is not only proper but necessary to effectuation of the Act's purposes, and that the construction of the proviso for which respondent contends seriously subtracts from the exclusive bargaining agent's representative rights, opens the door to individual bargaining and duality of representation, and undermines the entire process of collective bargaining, contrary to the Act's stated purpose to encourage "the practice and procedure" of collective bargaining (Section 1). Congress did not provide in the statute so facile a means for defeating it.

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<sup>8</sup> Section 9 (a) is quoted in full *supra*, note 4, p. 7. There is no claim that respondent's activities are otherwise permissible under the statute.

# 1. *A grievance procedure is an appropriate subject of collective bargaining*

As the Board stated (R. 61-62), "a collective contract is not complete as originally negotiated, nor is the process of collective bargaining complete upon the execution of a contract." To the contrary, the collective bargaining process is a continuing one, involving not only the consummation of collective contracts but their application and interpretation.<sup>9</sup> In this continuing process, the initial contract has aptly been described as merely the "general constitution upon which a body of industrial law is built." "The rules and regulations first set forth in the contract are elaborated and changed" in day to day application of the agreement, thus gradually evolving "into a body of industrial common law \* \* \*."<sup>10</sup> This interpretation and application of the contract are, of course, also essential parts of the collective bargaining process.<sup>11</sup>

<sup>9</sup> See, e. g., *N. L. R. B. v. Sands Mfg. Co.*, 306 U. S. 332, 342; *Rapid Roller Co. v. N. L. R. B.* 126 F. (2d) 452, 459 (C. C. A. 7), cert. den. 63 S. Ct. 45; *N. L. R. B. v. Newark Morning Ledger Co.*, 120 F. (2d) 266, 267 (C. C. A. 3), cert. den., 314 U. S. 693.

<sup>10</sup> Clinton S. Golden and Harold J. Ruttenberg, *The Dynamics of Industrial Democracy*, p. 43.

<sup>11</sup> See, e. g., Carroll R. Daugherty, *Labor Problems in American Industry*, 1938 (Revised Edition) :

"\* \* \* Collective bargaining is the process whereby representatives of a union meet with an employer or representatives of an employers' association to fix the terms of employment for a certain period of time. But it includes more than the creation of an agreement. There is more to it than the negotiations lasting a week or so. It involves also the enforcement and interpretation of the agreement throughout the months of its duration" [p. 450].

"The interpretation of the various detailed terms of the em-

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The grievance procedure established in the collective bargaining agreement is in a sense the judicial system by which normally this process of application and interpretation is carried on, since disputes regarding the meaning and application of the contract ordinarily arise as grievances and are therefore normally determined through recourse to the grievance procedure.<sup>12</sup> The agreement in the instant case ex-

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ployment contract is one of the most important parts of collective bargaining. It is essentially a judicial function and involves the application of the agreement to various questions and points that come up during the year" [p. 452].

Clinton S. Golden and Harold J. Ruttenberg, *The Dynamics of Industrial Democracy*:

"The written contract is a general constitution upon which a body of industrial law is built. The rules and regulations first set forth in the contract are elaborated and changed from day to day in the settlement of grievances and the interpretation of the contract. Gradually they evolve into a body of industrial common law, developed in a democratic manner" [p. 43].

<sup>12</sup> Watkins and Dodd, *The Management of Labor Relations*, 1938 (1st Edition):

"Although many trade agreements, like that covering the West-Coast maritime industry, provide for arbitration by an impartial arbiter or tribunal, the tendency is to use every possible means in adjusting grievances before they develop into major issues necessitating arbitration. In this regard, the shop committees, work councils, or business agents perform a valuable service. They assure early hearing and immediate attempts at adjustment. Because these committees or representatives are usually given rather broad powers of interpretation and execution of trade agreements, they constitute an important unit in the scheme of union-management cooperation and industrial peace" [p. 709].

See also The Twentieth Century Fund, *How Collective Bargaining Works* (1942), a description of bargaining in various industries, at pages 51, 244, 314, 360, 362, 418, 566, 596, 644, 652, 736, 801, and 858.

plicitly recognizes this fact; it provides for invocation of the grievance procedure "in the event of any dispute arising regarding the interpretation or application" of any term of the contract (*supra.*, p. 6). Indeed, the collective contract, in practice, attains its highest utility in realizing the purposes of the Act to substitute peaceful adjustment of labor disputes for strikes and industrial warfare, through the establishment and operation of the grievance procedure. Moreover, it is through successful handling of grievances, i. e., successful advocacy in the tribunals established by the grievance procedure, that labor unions frequently continue to demonstrate their efficacy to employees.

It is thus apparent that employees and their labor organizations have a vital interest in the establishment and operation of a grievance procedure. This interest is as real as is the concern of society generally with the kind of judicial system under which it functions; in each case, the nature of the system bears importantly upon those who resort to it rather than to force, when they feel injured. Indeed, the employees' concern with a grievance procedure may be as intense as is their concern with wages, hours, seniority, and other conditions of their employment, for a voice in the determination of which workers traditionally act in concert through labor unions, since the disposition of grievances, of course, necessarily requires the interpretation and application of the other substantive provisions of the collective contract.

Accordingly, it seems too plain for argument that a grievance procedure is a normal and proper subject

of collective bargaining. The Act on its face shows the Congressional awareness of this truism: if it were not so, the proviso to Section 9 (a) would have been unnecessary since employees would have been free in any event to deal individually with the employer regarding grievances even though an exclusive representative has been selected to deal on their behalf regarding wages, hours, and conditions of employment. And respondent in the instant case has in effect recognized this fact by bargaining with the Union concerning a grievance procedure and by including a provision covering the subject in its collective contract with that organization. Of course, the provisions of the collective contract establishing a grievance procedure, like the provisions covering any other appropriate subjects of collective bargaining, extend to *all* of the employees in the bargaining unit.

It is well settled that an employer may not, after the employees have selected a collective bargaining representative, insist upon the right to deal unilaterally with respect to matters which are appropriate subjects of collective bargaining. Such conduct in effect removes from the collective bargaining area matters as to which employees have a right to deal collectively with the employer, and constitutes a repudiation of the collective bargaining principle, in violation of Section 8 (1) and (5) of the Act. See, e. g., *Singer Mfg. Co. v. N. L. R. B.*, 119 F. (2d) 131, 136, 137-138 (C. C. A. 7), cert. den. 313 U. S. 595; *Great Southern Trucking Co. v. N. L. R. B.*, 127 F. (2d) 180, 186 (C. C. A. 4), cert. den. 63 S. Ct. 48.

*Inland Lime and Stone Co. v. N. L. R. B.*, 119 F. (2d) 20, 22 (C. C. A. 7); *N. L. R. B. v. Whittier Mills Co.*, 111 F. (2d) 474, 478–479 (C. C. A. 5); *N. L. R. B. v. Acme Air Appliance Co.*, 117 F. (2d) 417, 420 (C. C. A. 2); *N. L. R. B. v. George P. Pilling & Co.*, 119 F. (2d) 32, 36 (C. C. A. 3). This is, however, what respondent has done in the instant case, with respect to establishment of a grievance procedure.

2. *The proviso to Section 9 (a) of the Act does not sanction unilateral establishment of a separate grievance procedure for presentation of individual grievances, after a grievance procedure has been agreed upon with the exclusive representative of the employees*

Respondent contends that its right to establish unilaterally a separate grievance procedure for the settlement of grievances presented individually by its employees is implied in the proviso to Section 9 (a) of the Act. But the proviso, as is clear from its face, grants employees a choice to present their grievances individually or in groups despite their selection of an exclusive collective bargaining representative; it does not grant to an *employer* the right to deal *unilaterally* with regard to establishment of a grievance procedure. The proviso merely grants employees the right as litigants to employ *in personae* the grievance (i. e., judicial) procedure which the industrial constitution under which they work (and which through their labor union they had a voice in promulgating) establishes for adjustment of disputes. Respondent's contention that the reservation of this

right to litigate impliedly carries with it the right of an employer to establish unilaterally a separate judicial process in which to litigate, is plainly a *non sequitur*, and proceeds from a confusion of these entirely different elements. Obviously, the right to present grievances, the only right reserved by the proviso, has no necessary connection with the establishment or the nature of the procedure pursuant to which the right is exercised. Nothing in the language of the Act or its history suggests that Congress intended to exclude from the area of collective bargaining the establishment of a *grievance procedure*. To the contrary, as stated above, the fact that Congress added the proviso to Section 9 (a), giving individual employees the right to *present* grievances, suggests that Congress intended to leave establishment of a grievance procedure where it found it, i. e., an appropriate subject of collective bargaining with the exclusive representative.<sup>3</sup>

3. *The grievance procedure unilaterally established by respondent in the instant case, by its terms also violates the Act*

We submit that the considerations discussed in sections 1 and 2, *supra*, in and of themselves require

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<sup>3</sup> Respondent contends that its right to establish a separate grievance procedure for individual grievances is necessary to orderly and uniform presentation of such matters, and to proper management of its plant. But the Board's construction of the proviso insures such orderliness and uniformity; it requires the parties to use the single system established by agreement between the employer and the representative, except that employees are free to appear in person and without the representative, at each stage of the process.



enforcement of the Board's order herein. However, without regard to the foregoing considerations, we submit further that respondent's conduct with respect to the grievance procedure unilaterally established in the instant case also violates the Act in other respects.

*a. Respondent's separate grievance procedure creates a dual representative of the employees, contrary to the majority rule principle of Section 9 (a)*

Section 9 (a) of the Act provides that the representatives selected for purposes of collective bargaining by the majority of the employees "shall be the exclusive representatives of all the employees" for the purposes of collective bargaining in respect to wages, hours, and other conditions of employment. In the instant case, respondent, as part of the separate grievance procedure which it unilaterally established for individual employees, has designated its industrial relations staff to assist employees in presenting grievances and to "help in attempting to adjust" them (R. 21-22). Thus, respondent has in effect made its industrial relations staff an employees' representative in connection with presenting and adjusting disputes which, as we have demonstrated, normally include questions as to wages, hours, and other conditions of employment, and necessarily require the interpretation of substantive provisions of the collective contract. Accordingly, respondent's conduct creates a dual agent for representation of the employees in dealing with the employer concerning these appropriate subjects of collective bargaining, contrary to the express provision of Section 9 (a) that the majority representative shall be the "exclusive" agent of the

employees for purposes of bargaining with the employer with regard to such matters.

The proviso of Section 9 (a) gives no sanction to respondent's conduct; the proviso on its face reserves the right to "any individual employee or a group of employees" to present grievances to the employer; it does not provide that a *representative* other than the exclusive representative may do so. And it is clear from the legislative history that the proviso was intended to exclude any representative for presentation of grievances, other than the exclusive representative. In its draft form before the appropriate Senate and House Committees, the proviso expressly provided that "any individual employee or group of employees" should have the right to present grievances to the employer "through representatives of their own choosing." After criticism of the language of the draft as appearing to permit the employer to "build up another company union," the words permitting representation were stricken from the bill.<sup>14</sup>

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<sup>14</sup> The following colloquy occurred during the House hearings on the bill (see H. R. Report No. 1147, pages 1, 3), which was the predecessor of the Act (Hearings, House of Representatives, Committee on Labor, 74th Cong., 1st Sess., H. R. 6288, p. 301):

"The CHAIRMAN. On page 10, line 1, it provides—

"That any individual employee or group of employees shall have the right at any time to present grievances to their employer through representatives of their own choosing.

"That looks to me as if the employer could build up another company union.

"Secretary PERKINS. I have proposed an amendment that would make that language read—

"That nothing in this section shall deprive any individual employee or group of employees of the right at any time to present grievances to their employer."

"The CHAIRMAN. Do you think that your proposed amendment

It is thus clear, we submit, that respondent's conduct in the instant case in establishing a dual representative of the employees is directly contrary to the intention of Congress, and constitutes in effect a denial of recognition to the majority representative, as the exclusive representative. Such denial is, of course, a clear violation of Section 8 (5) and (1) of the Act. See e. g., *National Licorice Co. v. N. L. R. B.*, 309 U. S. 350, 358; *N. L. R. B. v. Griswold Mfg. Co.*, 106 F. (2d) 713, 719-720-721 (C. C. A. 3); *McQuay-Norris Mfg. Co. v. N. L. R. B.*, 116 F. (2d) 748, 751 (C. C. A. 7), cert. denied 313 U. S. 565.

*b. Respondent's separate grievance procedure also unlawfully permits individual bargaining after a collective bargaining representative has been selected*

As we have pointed out (*supra*, pp. 9-11), so far as the record discloses, there are no limitations upon the nature or type of grievances which may be submitted by individual employees under respondent's separate grievance procedure, nor are there any limitations upon the manner in which such grievances may be disposed of by respondent dealing directly

would take care of that?

"Secretary PERKINS. Yes; that is our judgment.

"The CHAIRMAN. In other words, your understanding is that if a majority of the plant employees decide to form a union and they were the ones to do the collective bargaining—suppose there was a minority of 40 percent and they went to the employer and presented their grievance, the collective-bargaining proposition would still have to be taken care of by the majority?

"Secretary PERKINS. That is my understanding."

See also Hearings, Senate Committee on Education and Labor, 74th Cong., 1st Sess., S. 1958, p. 69.

with the individual employees or by an arbitrator agreed upon by respondent and the individual employees. Thus, so far as appears, under its separate grievance procedure respondent may, despite the designation of an exclusive representative, deal directly with individual employees in disposing of grievances which, as we have indicated, necessarily require interpretation and application of the collective contract which fixes the wages, hours, and conditions of employment of *all* employees.

But, as has been demonstrated, the collective bargaining process is not complete upon negotiation of a collective contract; the interpretation and application of the contract to daily problems also constitute an integral part of the collective bargaining process. These questions of application and interpretation are normally determined through recourse to the grievance procedure, since disputes regarding the meaning or application of the contract ordinarily arise as grievances. While individuals may present grievances, the collective bargaining agent is, of course, the exclusive representative for purposes of dealing with the employer concerning these matters of interpretation, necessarily required in disposing of the grievances, as well as concerning the initial promulgation of the agreement. *N. L. R. B. v. Sands Mfg. Co.*, 306 U. S. 332, 342; *Rapid Roller Co. v. N. L. R. B.*, 126 F. (2d) 452, 459 (C. C. A. 7), cert. den. 63 S. Ct. 45.<sup>15</sup> And, as the Board pointed out (R. 62-63), whether grievances

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<sup>15</sup> See note 16, below.

are presented to the employer by the collective bargaining representative or by individual employees, they must necessarily be settled not only in accordance with the contract provisions, but equally necessarily, in accordance with all the precedents and interpretations of the contract between the employer and the exclusive bargaining representative by which the terms of employment of *all* the employees are established.<sup>16</sup>

It is thus apparent that respondent's grievance procedure permits individual bargaining as to wages, hours, and conditions of employment, after an exclusive representative has been selected, and denies to the exclusive representative the right to establish by collective bargaining the terms and conditions of employment of all employees in the appropriate unit. This is the very antithesis of sound collective bargaining, which it is the basic policy of the Act to encourage, and conflicts squarely with the principle of majority rule which Congress deliberately embodied in Section

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<sup>16</sup> We do not mean to suggest an employer may not act upon grievances individually presented by the employees. On the contrary, the Board expressly declared that the right of employees to present grievances implied the right of the employer "to receive and act upon" them (R. 60). But the grievances, whether presented individually or by the collective bargaining representative, must be settled, as the Board stated (R. 62-63), "in accordance with the provisions and interpretation of the contract between the employer and the exclusive bargaining representative by which the terms of employment of all the employees are established." In the instant case, however, respondent's notice to the employees permits disposition of grievances, even though involving interpretation of the collective contract, by respondent unilaterally or by an arbitrator selected by respondent and the individual employee, without regard to the exclusive bargaining agent.

9 (a) of the Act.<sup>17</sup> Clearly, one of the major purposes of Congress in adopting this principle was to foreclose employers from bargaining with individuals and minority groups after a majority had selected a representative.<sup>18</sup>

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<sup>17</sup> Sen. Rept. No. 573, 74th Cong., 1st Sess., p. 13, states with reference to the principle of majority rule:

“The object of collective bargaining is the making of agreements that will stabilize business conditions and fix fair standards of working conditions. Since it is wellnigh universally recognized that it is practically impossible to apply two or more sets of agreements to one unit of workers at the same time, or to apply the terms of one agreement to only a portion of the workers in a single unit, the making of agreements is impracticable in the absence of majority rule. And by long experience, majority rule has been discovered best for employers as well as employees. Workers have found it impossible to approach their employers in a friendly spirit if they remained divided among themselves. Employers likewise, where majority rule has been given a trial of reasonable duration, have found it more conducive to harmonious labor relations to negotiate with representatives chosen by the majority than with numerous warring factions.”

The House Report is similar in tenor. (See House Rept. No. 1147, 74th Cong., 1st Sess., pp. 20–21.) Obviously, respondent, in arguing in effect for individual bargaining for each of its employees, is contending for the ultimate in the division of employees among themselves, against which Congress sought to guard in adopting the majority rule.

<sup>18</sup> See, e. g., *Humble Oil & Refining Co. v. N. L. R. B.*, 113 F. (2d) 85, 87 (C. C. A. 5), in which the Court declared that—

“So long as a majority of the employees in each plant freely choose to belong to or be represented by the Federations they are the bargaining representatives and the contracts they make cannot be ignored. *Minority groups may separately present their grievances, but must submit to bargain through the majority representatives.*” [Italics added];

and *N. L. R. B. v. Knoxville Publishing Co.*, 124 F. (2d) 875,

The Congressional history of the Act confirms this proper view. In reporting the bill which became the Act, the Senate Committee on Education and Labor, referring to Section 9 (a), stated:

Majority rule carries the clear implication that employers shall not interfere with the practical application of the right of employees to bargain collectively through chosen representatives *by bargaining with individuals or minority groups in their own behalf*, after representatives have been picked by the majority to represent all [S. Rept. No. 573, 74th Cong., 1st Sess., p 13]. [italics added.]

The Report of the House Committee on Labor is equally clear. It stated:

Section 9 (a) incorporates the majority rule principle, that representatives designated for the purposes of collective bargaining by the majority of employees in the appropriate unit shall be the exclusive representatives of all the employees in that unit "for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other condi-

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881-882 (C. C. A. 6), where the Court stated:

"The intent of the Act was to permit an employee to surrender to a collective agent his individual right to bargain with an employer, after which he no longer possesses this right during the life of the contract and the statute requires the employer to deal exclusively with the agent of his employees if one has been selected as provided."

See, also, cases cited note 19, below.

tions of employment.” As a necessary corollary it is an act of interference (under sec. 8 (1)) for an employer, after representatives have been so designated by the majority, to negotiate with individuals or minority groups in their own behalf on the basic subjects of collective bargaining [H. Rept. No. 1147, 74th Cong., 1st Sess., p. 20].

\* \* \* \* \*

Since the agreement made will apply to all, the minority group and individual workers are given all the advantages of united action. And they are given added protection in various respects. First, the proviso to Section 9 (a) expressly stated that “any individual employee or a group of employees shall have the right at any time to present grievances to their employer.” And the majority rule does not preclude adjustment in individual cases of matters outside the scope of the basic agreement. Second, agreements more favorable to the majority than to the minority are impossible, for under section 8 (3) any discrimination is outlawed which tends to “encourage or discourage membership in any labor organization” [*Ibid.* p. 21].<sup>19</sup>

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<sup>19</sup> Cf., also, *National Licorice Co. v. N. L. R. B.*, 309 U. S. 350, 360-361; *N. L. R. B. v. Stone, et al.*, 125 F. (2d) 752, 756 (C. C. A. 7), cert. den. 63 S. Ct. 44; *N. L. R. B. v. Acme Air Appliance Co.*, 117 F. (2d) 417, 420 (C. C. A. 2); *N. L. R. B. v. Superior Tanning Co.*, 117 F. (2d) 881, 891-892 (C. C. A. 7), cert. den. 313 U. S. 559.

*N. L. R. B. v. Union Pacific Stages, Inc.*, 99 F. (2d) 153 (C. C. A. 9), is not to the contrary. In that case, as this Court noted, the union involved had acquiesced in direct settlement of a grievance. The Court declared that the Act “does not inhibit adjustment of individual grievances directly between employee and employer



It may not be said that Congress intended the proviso to read into Section 9 (a) a wide door to defeat the clear Congressional intent in enacting that section.<sup>20</sup>

*c. Respondent's conduct in the instant case unlawfully discourages the employees from utilizing the collective bargaining procedure for disposing of grievances*

Finally, there is another vice in respondent's conduct in the instant case. Respondent's notice to the employees describes the grievance procedure unilaterally established by respondent as "company policy," in contradistinction to "collective bargaining" (R. 22). As the Board pointed out (R. 64), respondent thus is implicitly expressing its preference for that procedure rather than for collective bargaining and is inviting the employees to use it rather than the contract procedure. Moreover, respondent is in effect suggesting that the employees may secure benefits

and such procedure is entirely consistent with collective bargaining in matters affecting employees as a class" (99 F. (2d) at 164). As we have shown (pp. 13-16), a grievance procedure is a subject of collective bargaining which obviously affects the employees "as a class" in a vital way. Moreover, nothing in the Court's statement suggests that an employer may deal unilaterally with an individual employee concerning a matter covered by a collective bargaining contract affecting *all* of the employees. Respondent's grievance procedure in the instant case, however, permits such conduct.

<sup>20</sup> Cf. *N. L. R. B. v. Stone*, 125 F. (2d) 752, 756 (C. C. A. 7), cert. denied, 63 S. Ct. 44, in which the Court described a provision in a contract with individual employees, providing for individual bargaining and reference of disputes to arbitration, as "the very antithesis of collective bargaining." See, also, *N. L. R. B. v. Highland Shoe, Inc.*, 119 F. (2d) 218, 221 (C. C. A. 1), in which the Court declared: "Clearly to bargain directly with one's employees is not to bargain with their designated exclusive representative."

under “company policy” which are different from those negotiated by the Union. Such conduct is inconsistent with good faith acceptance of the collective bargaining principle and recognition of the Union as the exclusive agent, and constitutes palpable interference with the employees’ rights to bargain collectively through their chosen representative, free from the intrusion or influence of the employer.<sup>21</sup>

### *Recapitulation*

In sum, we submit that the negotiation of a grievance procedure is a proper subject of collective bargaining, and that once a grievance procedure is established by agreement between the employer and the exclusive representative of the employees, the employer may not unilaterally establish a dual grievance procedure for presentation of grievances by individual employees. Respondent’s contention that the right of an employer unilaterally to establish a dual procedure is implied in the proviso to Section 9 (a), is without merit. The proviso, as is clear from its face, merely grants individual employees the right to present grievances; it does not deal with establish-

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<sup>21</sup> The impropriety of respondent’s conduct is apparent from a consideration of perhaps less subtle action to achieve the same purpose. Thus, respondent might, for example, establish a grievance procedure for presentation of individual grievances which provided for submission of grievances directly to the highest officials of respondent and thereafter to a committee of three non-supervisory employees in the department involved. The destructive effects upon the Union’s representative status which would inevitably flow from such a course require no elaboration; employees could scarcely be expected in such circumstances to use the Union as their representative.

ment of a *grievance procedure*, as respondent in effect contends. Moreover, the construction of the proviso for which respondent contends, would, as the facts of this case demonstrate, in effect destroy the statutory right of the majority representative to *exclusive* representation of *all* the employees, would permit dual representation of the employees, and would permit individual bargaining after an exclusive representative had been selected. Such results are plainly repugnant to the stated objectives of the Act to encourage the practice and procedure of collective bargaining.

## POINT II

**The Board's order is wholly valid and proper under the Act**

The Board's order requires respondent to cease and desist from (1) refusing to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit; (2) distributing copies of the notice of August 12 to the employees; (3) giving effect to the grievance procedure established in the notice; and (4) engaging in any "like or related acts or conduct" interfering with the employees' exercise of the rights guaranteed them in Section 7 of the Act (R. 68-69). The validity of these provisions upon the findings made is clear. Section 10 (c) of the Act; *N. L. R. B. v. Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, 265; *N. L. R. B. v. Express Publishing Co.*, 312 U. S. 426, 435-437; *N. L. R. B. v. Grower-Shipper Vegetable Association of Central California*, 122 F. (2d) 368, 376, 377 (C. C. A. 9); cf. *National Licorice Co. v. N. L. R. B.*, 309 U. S. 350, 361, 364, 367.

Equally well established is the propriety of the affirmative provisions of the Board's order. These direct respondent (1) to bargain collectively, upon request, with the Union as the exclusive representative; (2) to advise each of the employees who has received a copy of the notice of August 12, that the notice is null and void and that respondent will give no effect to the grievance procedure established therein; and (3) to post and maintain appropriate notices to the employees of compliance with the Board's order (R 69-70). E. g., *N. L. R. B. v. P. Lorillard Co.*, 314 U. S. 512; the *National Licorice case*, 309 U. S. 350, 367.

#### CONCLUSION

It is respectfully submitted that the Board's findings are supported by substantial evidence, that its order is valid and proper, and that a decree should issue enforcing the order in full.

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FEBRUARY 1943.

*Argued by Mr. Nicolson.*

## APPENDIX

Pertinent provisions of the National Labor Relations Act are as follows:

SECTION 1. The denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce \* \* \*

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

SEC. 2. When used in this Act—

\* \* \* \* \*

(7) The term “affecting commerce” means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

\* \* \* \* \*

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to

engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

\* \* \* \* \*

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

SEC. 9.

(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer.

\* \* \* \* \*

(c) \* \* \* If \* \* \* the Board shall be of the opinion that any person \* \* \* has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. \* \* \*

\* \* \* \* \*

(e) The Board shall have power to petition any circuit court of appeals of the United States \* \* \* within any circuit or district, respectively, wherein the unfair labor practice

in question occurred or wherein such person resides or transacts business, for the enforcement of such order \* \* \* The findings of the Board as to the facts, if supported by evidence shall be conclusive. \* \* \*





No. 10313.

IN THE  
United States Circuit Court of Appeals  
FOR THE NINTH CIRCUIT

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NATIONAL LABOR RELATIONS BOARD,

*Petitioner,*

*vs.*

NORTH AMERICAN AVIATION, INC.,

*Respondent.*

---

On Petition for Enforcement of an Order of the National  
Labor Relations Board.

---

BRIEF OF NORTH AMERICAN AVIATION,  
INC., RESPONDENT.

---

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No. 10313.

IN THE

United States Circuit Court of Appeals  
FOR THE NINTH CIRCUIT

---

NATIONAL LABOR RELATIONS BOARD,

*Petitioner,*

*vs.*

NORTH AMERICAN AVIATION, INC.,

*Respondent.*

---

On Petition for Enforcement of an Order of the National  
Labor Relations Board.

---

BRIEF OF NORTH AMERICAN AVIATION,  
INC., RESPONDENT.

---

Statement of the Case.

In view of the shifting positions taken by the Board and the wide range of discussion indulged in by the Board in its brief, it becomes particularly important to note the issues herein as presented by the complaint. Likewise, it is important to set down, as clearly as possible, the opposing contentions, especially in view of the fact that the Board has never committed itself to any definite statement of its theory but deliberately states its contentions in a compound and complex form.

### The Complaint.

Giving the widest possible scope to the allegations of the complaint, it charges that by the giving of a notice to its employees, respondent “did establish unilaterally a procedure for the settlement and adjustment of disputes or grievances” \* \* \* “under which procedure grievances would be handled directly with the employees involved without the knowledge, consent, or participation of the Union.” [Tr. p. 4.]

This is the entire charge.

The complaint therefore presented the issue of whether a procedure for the settlement of individual grievances of employees is invalid, unless established with the knowledge, consent, or participation of the Union.

It will be noted that there was no issue whatever as to the *scope* of the grievances for which presentation was provided in the notice.

Likewise that there was no objection to the *type of procedure* established, or to the act of the Company in giving notice of such procedure, except that the notice was given without consultation with the Union, and the grievances were to be handled directly with the employees involved without the Union’s knowledge, consent or participation.

### Statement of Issues.

Obviously, the charge was framed on the theory that there was no substantive right of individual presentation or adjustment of grievances, but only such right as the Union should consent might be exercised by the employee.

There was thus squarely presented the scope of the proviso of Section 9(a), 29 U. S. C., Sec. 159(a), which, after requiring collective bargaining with the exclusive representative of the employees, states:

“Provided, that any individual employee or a group of employees shall have the right at any time to present grievances to their employer.”

There was also presented for determination the legal effect of the provision of Article V of the Contract between the Company and the Union under the heading “GRIEVANCE PROCEDURE” [R. pp. 11, 15], Subdivision (10) of said paragraph reading as follows:

“No provision of this Article shall be interpreted to prevent any employee or group of employees from presenting grievances to the management in accordance with the provision of Section 9(a) of the National Labor Relations Act.”

In addition to the statutory right of grievance presentation given by Section 9(a), the individual employees had, *by contract*, an express stipulation that the grievance procedure established by the Union contract should not be interpreted to prevent the employees individually, or as a group, from presenting grievances to the management.

Obviously, the contract grievance procedure was not exclusive, and did not operate to restrict individual grievance presentation.

The Board in the course of these proceedings has asserted at least six different and divergent positions:

(1) That there is no right of individual grievance beyond the mere ministerial act of filing a grievance.

(2) That although an employee may file a grievance, he is powerless to bring it on for hearing or to proceed otherwise than through the Union.

(3) That even though an employee may present a grievance and may negotiate with the management up to the final stage of arbitration, he is powerless to enforce arbitration or to arrange for arbitration or other final disposition of his grievance without the consent of the Union; that it is the element of arbitration which condemns the procedure criticized.

(4) That although there is a right of individual grievance presentation and prosecution, there is, nevertheless, no right upon the part of employees<sup>r</sup> to give notice of any method of any time, place, or means by which such grievance will be accepted or determined.

(5) That although there may be a right to individual grievance presentation and to give a notice of the method of procedure, the particular notice given in the present case is too broad as it did not limit the type of grievances to be received to those matters not related to the general agreement.

(6) That although there is a right of individual grievance presentation and prosecution to determination, and a right to give notice calculated to facilitate such presenta-

tion, nevertheless, the type of grievances which may be adjusted or settled by individual grievance presentation is limited to those without the scope of the collective bargaining agreement.

None of the foregoing contentions has any basis in the charge set forth in the complaint, which sets forth only two objections to the notice:

- (a) it was sent without prior consultation with the Union, and
- (b) it provided for grievance determination without the knowledge, consent, or participation of the Union.

The Board has persevered in one or more of the foregoing six contentions (other than those based upon the complaint) at all stages of the case, varying its position from time to time to meet the exigencies of the situation.

The Board's brief, likewise, at one point or another, urges all of the foregoing six contentions, skipping from position to position with all the dexterity of an old time circus performer engaged in riding six horses around the ring, jumping from one to the other regardless of divergent courses or objectives. It is especially difficult to determine the position of the Board upon any point, as it usually insists upon riding more than one horse at the same time.

All contentions, as well as the charge in the complaint, are stated in a compound and complex form.

The Board's brief has abandoned entirely the two charges contained in the complaint.

The first charge, as to sending the notice without consultation with the Union, is ignored.

The second charge, as to settlement of grievances without Union participation, is expressly withdrawn by the concession, at page 18, footnote 3, that the employee may “appear in person and without the representative, at each stage of the process,” provided he uses the “single system” established by the Union contract.

The suggestion as to the use of the single system, however, is untenable for two reasons, (a) the contract procedure calls for presentation by a Union representative at all four steps subsequent to the first step in the grievance procedure, and (b) the Union contract expressly provides, Art. V, Subd. 10, that the procedure therein provided shall not prevent direct grievance presentation to the management under Section 9a.

The Board has substituted for argument, the liberal use of such cliches as “individual bargaining,” “duality of representation,” “dual grievance procedure,” “unilateral establishment,” “unilateral dealing,” and “company policy.”

Respondent’s brief devotes its entire point III (pp. 18-28) to the *scope* of the notice, thus indicating that the Board’s present objection is mainly to the terms of the notice itself; but there was no issue whatever in the case either by the pleadings or the evidence as to the scope of the notice and the Examiner expressly refused to permit evidence as to the scope of such notice. [R. pp. 146-147.]

### **Specification of Errors Relied Upon by Respondent.**

Respondent's position, briefly summarized, is that the Board erred in denying the validity of respondent's contentions as follows:

(1) There was no evidence at the hearing that the act of respondent complained of constituted an unfair labor practice affecting commerce. The matter of the giving of the notice, if it gave rise to a grievance in favor of the Union, is a matter for arbitration under the labor contract. There is no call for sidestepping determination by the regular method of arbitration and invoking the disciplinary action of the Board hearing and court action upon the mere charge that respondent has taken some unilateral action which the Union contends constitutes an infringement of its rights.

(2) Under the National Labor Relations Act there is a right of individual grievance presentation which involves the prosecution of such grievance to a final settlement.

(3) That by the express terms of the contract between the Company and the Union, the grievance procedure therein provided for the determination of grievances through the Union does not apply to any employees or group of employees desiring to invoke their right to present grievances to the management individually.

(4) That the right to present grievances individually involves a corresponding duty upon the part of the Company to receive, hear, and adjust the grievances by arbitra-

tion, if necessary, *i. e.*, by the utilization of a reasonably fair and effective procedure.

(5) That the necessity of providing for such a hearing and determination justifies, and in fact, necessitates, as a practical matter, the giving of a notice setting forth the date, place and manner of hearing and determination of the grievance.

(6) That any objection as to the scope or terms of the notice stating the method of determination of grievances is not available upon this proceeding, because there was no pleading or proof that the method suggested was improper, or, that other grievances than those properly determined individually were heard and passed upon.

(7) The order of the Board is too broad.



## BRIEF OF THE ARGUMENT.

### I.

There Was No Evidence at the Hearing That the Act of Respondent Complained of Constituted an Unfair Labor Practice Affecting Commerce.

The Matter of the Giving of the Notice, if It Gave Rise to a Grievance in Favor of the Union, Is a Matter for Arbitration Under the Labor Contract.

There Is No Call for Sidestepping Determination by the Regular Method of Arbitration and Invoking the Disciplinary Action of the Board Hearing and Court Action Upon the Mere Charge That Respondent Has Taken Some Unilateral Action Which the Union Contends Constitutes an Infringement of Its Rights.

The evidence is uncontradicted that the Union was recognized as the exclusive representative of the employees, and that the Company did bargain with it, and that the bargaining resulted in the consummation of a contract, and that respondent continued to bargain with the Union at all times. [R. pp. 3, 98, 106, 108, 111, 119, 120, 123-134.]

The present dispute is one which, under the terms of the contract, the parties are bound to arbitrate. It cannot be assumed that the arbitration provided for would result in an illegal or improper decree. If the employer is to be subjected to prosecution before the Board and the Courts for the giving of any isolated notice, or any other act on

its part, without the consent of the Union first obtained, then the entire purpose of the act, which is to foster and facilitate collective bargaining and the amicable settlement of disputes without resort to the courts, is frustrated.

The Board has assumed throughout that there was an affirmative duty on the part of the employer to enter into negotiations for collective bargaining with reference to the notice before the notice was sent out. This is contrary to all the decisions.

*N. L. R. B. v. Sands Mfg. Co.*, 306 U. S. 332, 344;  
83 L. Ed. 682, 690.

II.

Under the National Labor Relations Act There Is a Right of Individual Grievance Presentation Which Right Involves the Prosecution of Such Grievance to a Final Settlement, Without Interference From the Union.

The right of individual grievance presentation is thoroughly settled in the decisions:

*N. L. R. B. v. Union Pacific States* (C. C. A. 9), 99 Fed. (2d) 153, 164;

*General Committee of Adjustment of the Brotherhood of Locomotive Engineers v. Southern Pacific Company*, (C. C. A. 9), 132 Fed. (2d) 194;

*N. L. R. B. v. Jones & Laughlin, etc. Corp.*, 301 U. S. 1, 44-45; 81 L. Ed. 893, 915-916;

*Wilson & Co. v. N. L. R. B.* (C. C. A. 8), 115 Fed. (2d) 759, 763;

*Midland Steel Products Company v. N. L. R. B.* (C. C. A. 6), 113 Fed. (2d) 800, 803;

*N. L. R. B. v. Gutmann & Co.* (C. C. A. 7), 121 Fed. (2d) 756, 759-60;

*Precision Castings Co. v. Boland*, 13 Fed. Supp. 877, 884 (D. C. N. Y.);

*In re Shanty Shops, Inc., and Chain Service Restaurant Employee's Union*, 8 Labor Relations Reporter, p. 840;

- Noble v. State* (Tex.), 17 S. W. (2d) 1063, 1064.  
59 *Corpus Juris.*, p. 1093;  
59 *Corpus Juris.*, p. 973;  
*Dooley v. Penna. Ry. Co.* (D. C. Minn.), 250 Fed.  
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501, 514;  
*Galveston H. & S. A. Ry. Co. v. Hennigan* (Tex.),  
76 S. W. 452;  
*Grace Co. v. Williams, et al.* (D. C. Mo.), 20 Fed.  
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III.

By the Express Terms of the Contract Between the Company and the Union, the Grievance Procedure Therein Provided for the Determination of Grievances Through the Union Does Not Apply to Any Employees or Group of Employees Desiring to Invoke Their Right to Present Grievances to the Management Individually.

By the agreement [R. pp. 11, 15] Article V, Subsection (10) the Union expressly agreed that the provisions of the Article entitled Grievance Procedure which established a method of presenting and determining grievances through the Union should not

“be interpreted to prevent any employees or group of employees from presenting grievances to the management in accordance with the provisions of Section 9(a) of the National Labor Relations Act.”

IV.

**The Right to Present Grievances Individually Involves a Corresponding Duty Upon the Part of the Company to Receive, Hear, and Adjust the Grievances by Arbitration, if Necessary, i. e., by the Utilization of a Reasonably Fair and Effective Procedure.**

The right of an individual employee, or group of employees, to present grievances, is not limited to the mere filing thereof. The statutory right, and also the contract right, granted to employees, to individually present their grievances to the employer, involves the corresponding duty on the part of the employer to hear and adjust such grievances.

*Grace Co. v. Williams* (D. C. Mo.), 20 Fed. Supp. 263, 266;

*Noble v. State* (Tex.), 17 S. W. (2d) 1063, 1064;  
59 *Corpus Juris.*, p. 1093;

59 *Corpus Juris.*, p. 973;

*Dooley v. Penna. Ry. Co.* (D. C. Minn.), 250 Fed. 152, 143;

*Coty v. Prestonettes, Inc.* (C. C. A. 2), 285 Fed. 501, 514;

*Galveston H. & S. A. Ry. Co. v. Hennigan* (Tex.), 76 S. W. 452.

V.

**The Necessity of Providing for Such a Hearing and Determination Justifies, and in Fact, Necessitates, as a Practical Matter, the Giving of a Notice Setting Forth the Date, Place and Manner of Hearing and Determination of the Grievance.**

The Company, in order to comply with its duty of hearing and determining the grievances, was required to designate a representative to hear the grievance, to fix a time and place where it might be heard, and make some reasonable arrangement for the disposition of the grievance.

The employer has the duty, in the orderly conduct of its business, to give notice of the date, place, manner, and persons to whom the individual grievances may be presented, and to provide for a method of receiving and adjusting such grievances. In a concern having many thousands of employees, it is vitally necessary in order to maintain a consistent grievance procedure and avoid discrimination, that notice of such arrangements be imparted to the employees. In the absence of such a notice no real opportunity of presentation is afforded.

VI.

Any Objection as to the Scope or Terms of the Notice Stating the Method of Determination of Grievances Is Not Available Upon This Proceeding, Because There Was No Pleading or Proof That the Method Suggested Was Improper, or That Other Grievances Than Those Properly Determined Individually Were Heard and Passed Upon.

The complaint did not allege that the notice was too broad or went beyond its proper scope. The sole charge was that the notice was sent without the knowledge or consent of the Union, and provided for determination of grievances without the Union's knowledge, consent or participation.

The Company's offer of proof with respect to its attempting to supersede the notice by a new notice obviating the Union's objections as to the form of the previous notice was rejected by the Board. [R. pp. 110-111.] The offer of proof as to what grievances had been handled under individual grievance procedure was also rejected. [R. pp. 146-137.] There is neither claim nor proof that the scope of the grievances extended beyond those permitted by the Act.

It cannot be assumed in the absence of evidence that the law has been or will be violated, but, on the contrary, there is a presumption that the law will be obeyed.

Again there was no issue whatever in the complaint as to the legality of the provision for arbitration as the final step in grievance handling or as to the efficacy or fairness of the particular method suggested in the notice.



VII.

**The Order of the Board Is Too Broad.**

The sole issue is the propriety of the giving of notice of the method for handling individual grievances, without the consent of or consultation with the Union. The Board, even if its charges were sustained, could only direct the recall of the notice. It could not even direct a modification of the notice as there was no issue as to the scope of the notice.

*N. L. R. B. v. Express Pub. Co.*, 312 U. S. 426, 436-6; 85 L. Ed. 930, 937;

*Bethlehem Steel v. N. L. R. B.* (C. C. A. D. C.), 120 Fed. (2d) 641, 707-8.

## ARGUMENT.

### I.

There Was No Evidence at the Hearing That the Act of Respondent Complained of Constituted an Unfair Labor Practice Affecting Commerce.

The Matter of the Giving of the Notice, if It Gave Rise to a Grievance in Favor of the Union, Is a Matter for Arbitration Under the Labor Contract.

There Is No Call for Sidestepping Determination by the Regular Method of Arbitration and Invoking the Disciplinary Action of the Board Hearing and Court Action Upon the Mere Charge That Respondent Has Taken Some Unilateral Action Which the Union Contends Constitutes an infringement of Its Rights.

The charge and finding that respondent has refused to collectively bargain is absurd in view of the uncontradicted evidence that respondent has at all times bargained in good faith with the Union in all matters of collective bargaining, including the labor contract, Union grievance procedure, and individual grievance procedure. [R. pp. 3, 98, 106, 108, 111, 119, 120, 124-134.] The very notice which is the basis of the present complaint was carried through the first four steps of the regular grievance procedure and up to the point of arbitration itself. *It was, in fact, the Union which refused to negotiate further.* [R. pp. 124-134.] The Company offered to prove that it had gone so far as to prepare a second notice superseding the criticized notice. A copy of the second

notice, which was prepared to meet the Union's objections, appears in the record as Exhibit "B." The second notice would have been distributed to all employees if the Union had not instituted the proceedings before the Board. An offer of proof of these matters was rejected by the Board. [R. pp. 110-111.]

The Company further offered to show that only two grievances had been handled under the procedure provided for by the notice upon which the charge is based, whereas more than 800 had been disposed of under the regular contract grievance procedure. This offer of proof was rejected by the Board. [R. pp. 146-147.]

However, the Board states in its decision that "the Board accepts as true the facts which the respondent offered to prove. Assuming their truth, they do not affect the Board's decision as hereinafter set forth." [R. p. 51, footnote 3.]

There was no charge of any coercion, restraint, or interference, and no evidence thereof. The facts thus indirectly conceded by the Board conclusively answer any possible contention that any misunderstanding, coercion, or restraint resulted or could result from the giving of the notice complained of.

There is no proof whatsoever of any refusal to bargain collectively with the Union as the exclusive representative of the employees, or that respondent has engaged, or is engaging in any unfair labor practice within the meaning of Section 8(1) or Section 8(5) of the Act, or that the

act of respondent complained of constituted an unfair labor practice affecting commerce or the free flow of commerce in any manner whatever.

The Board's findings on these jurisdictional issues are entirely unsupported. Under the agreement between the Company and the Union [Exhibit "A" of the complaint] the act charged in the Board's complaint, at most, could give rise to a claim or grievance on the part of the Union for which amicable settlement was provided by the grievance procedure.

There was nothing in the evidence to indicate that a labor dispute would or could arise, or that the parties would not carry out the terms of the contract and proceed to settle the dispute upon which the present complaint is based, by arbitration. Likewise, there can be no assumption that the arbitration thus provided for would result in any illegal or improper award.

There was no evidence whatever of any request on the part of the Union to negotiate this particular dispute, except the admitted fact that the dispute was negotiated up to the point of arbitration. [R. pp. 124-134.]

There is no refusal to negotiate where there is no request to negotiate.

*N. L. R. B. v. Columbian, etc. Steel Co.*, 306 U. S. 292, 297-298; 83 L. Ed. 660, 664:

"To put the employer in default here the employees must at least have signified to respondent their desire to negotiate."

*N. L. R. B. v. Sands Mfg. Co.*, 306 U. S. 332, 344; 83 L. Ed. 682, 690:

“There could be, therefore, no duty on either side to enter into further negotiations for collective bargaining in the absence of a request therefore by the employees.”

*Great Southern Trucking Co. v. N. L. R. B.* (C. C. A. 4), 127 Fed. (2d) 180, 185:

“It is elementary that the National Labor Relations Act does not compel an employer to seek out his employees or request their participation in negotiations for purposes of collective bargaining.”

In view of the record, the charge and finding that respondent has refused to bargain collectively has a very hollow ring.

Admittedly the National Labor Relations Act contemplates individual presentation of grievances in some method; admittedly the contract by the respondent contemplates individual grievance presentation (Article V, Subd. 10); admittedly the Union grievance procedure provided by Article V does not apply to or affect the right or manner of individual grievance presentation. Any dispute relative to the contractual provision of individual grievance presentation is expressly made subject to arbitration by the labor contract.

Out of the many grievances which the Union has presented and adjusted, and settled through the contract grievance procedure, it has seized upon this particular in-

stance as one in which it will not submit to the award of an arbiter, but has elected to put the Company to the expense and trouble of a formal hearing before the Board, and contempt proceedings before this court.

If an arbitration clause can thus be avoided by the Union and the employer penalized by being subjected to prolonged and expensive litigation before the Board and Appellate Courts, then the entire purpose of the Act will be frustrated.

There is no action which the Company can take in the prosecution of its business which will not equally expose it to a charge of "refusing to collectively bargain." The Union could always assert that *any* act of the Company, regardless of whether it was taken in the utmost good faith, was "without consultation with or consent of the Union," and force the employer to expensive court proceedings to establish its willingness to negotiate and the refusal on the part of the Union to negotiate, and that the action taken was in good faith.

It is submitted that the present case directly presents to this court the issue of the propriety of the Board and the courts taking jurisdiction of such a controversy between the parties to a contract as to the meaning of the terms thereof, when such contract contains within itself a reasonable and automatically operative provision for final determination of any such dispute. The court is being asked to lend a hand to the arbitrary repudiation by one of the parties of the contractual requirement of arbitration.

II.

Under the National Labor Relations Act There Is a Right of Individual Grievance Presentation Which Right Involves the Prosecution of Such Grievance to a Final Settlement, and Without Interference From the Union.

It was the contention of the Board's attorney and also of the counsel for the Union that the right of individual grievance presentation provided by Section 9(a) and also by the contract, Article V, Subdivision (10), was limited to the mere "filing" of a complaint (and that the employee could do nothing beyond filing). Any further action would have to be taken through the Union. Nor could he require any action to be taken with regard to the complaint so filed.

At the oral argument in Washington, counsel for the Union receded from this position, for the first time, to the extent that he conceded that there was a limited right of grievance presentation without the scope of the Union's jurisdiction.

"The Chairman: Yes. You couldn't do anything more than present them; no obligation.

Mr. Kaplan: No; *we are not contending that matters outside the scope of our jurisdiction can't be adjusted . . .*" [R. p. 46.]

The Board's position in its brief, pages 12-17, is now apparently

(1) that the matter of grievance procedure "is an appropriate subject of collective bargaining" (p. 13), and

(2) that “*after* a grievance procedure has been agreed upon with the exclusive representative of the employees” the employer may not hear individual grievances through any other procedure (pp. 17-18).

In other words, the Board still contends that whatever right of grievance presentation exists, it must be exercised and prosecuted through the Union, or through a method negotiated by the Union, and not otherwise. No cases whatever are cited which support this contention.

The cases, without dissent, establish (1) that the right to present grievances is not limited to the mere filing of a complaint; (2) that the statutory right granted to employees individually to present their grievances involves the corresponding duty on the employer to hear and adjust such grievances (see point IV, *infra*); and (3) that such grievances, without limitation, may be prosecuted by the employee to final settlement or adjustment, without interference from the Union.

**(a) The Right of an Individual Employee or Group of Employees to “Present” Grievances Is Not Limited to the Mere Filing of a Complaint.**

The statute (Section 9(a)) gives to the individual employee “the right at any time to present grievances to their employer.”

The contract, Article V, Subsection (10), provides that the terms of the Article “Grievance Procedure” shall not be interpreted “to prevent any employees or group of employees from presenting grievances to the management in



accordance with the provisions of Section 9(a) of the National Labor Relations Act.”

The right to present grievances implied the right to obtain their consideration. Webster’s Dictionary defines the word “present”:

“to lay before, or submit to, a person or body for consideration or action; as, to present a . . . petition . . . .”

In *Noble v. State* (Tex.), 17 S. W. (2d) 1063, 1064, the word “present” is defined as follows, quoting Century Dictionary:

“ ‘Present’ means ‘to lay before a judge, magistrate, or governing body for action or consideration; submit, as a petitioner, remonstrance, etc., for a decision or settlement to the proper authorities.’ ”

The very fact that special provision is made for individual employee petitions shows that Congress was giving to the employee a right which otherwise would have been inhibited by the general provision.

59 *Corpus Juris*, p. 1093:

“Another generally accepted rule of construction is an exception of a particular thing from the general words shows that, in the opinion of the law-giver, the thing excepted would be within the general provision had not the exception been made.”

The rule of the decision cited under subhead (c) *infra* is that an employee may not only present his grievances but may obtain a hearing and effect an adjustment.

- (b) The Statutory Right and Also the Contract Right Granted to Employees to Individually Present Their Grievances to the Employer Involves the Corresponding Duty on the Employer to Hear and Adjust Such Grievances.

See point IV, *infra*.

- (c) Such Grievances Without Limitation May be Prosecuted by the Employee to Final Settlement or Adjustment Without Interference From the Union.

In *N. L. R. B. v. Union Pacific Stages* (C. C. A. 9), 99 Fed. (2d) 153, 164, there was evidence that the General Superintendent of the Company had settled directly with individuals who had presented grievances to the Company, and the Board found that, in settling directly with the individuals involved, the Company was attempting to arouse in the employees "the feeling that it was superfluous to negotiate with the management through the Union," and that such conduct constituted interference with the rights of its employees under the Act. (p. 163.) In that case this court held:

"The above quoted finding indicates that the Board followed the position asserted by the attorney for the Union to the effect that an employer under the circumstances was deprived of any right to make any settlement of a grievance directly with an employee even as in this case where the representatives of the Union acquiesced in the suggestion that it be accomplished in that way.

"This was not a correct interpretation *either of the agreement or the law*.

"Section 9(a) of the Act, 29 U. S. C. A. sec. 159(a), contains the proviso that 'any individual employee or a group of employees shall have the right

at any time to present grievances to their employer.' Thus the Act does not inhibit *adjustment of individual grievances directly between employee and employer and such procedure is entirely consistent with collective bargaining in matters affecting employees as a class*. This view finds support in *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 57 S. Ct. 615, 81 L. Ed. 893, 108 A. L. R. 1352. Here, again, referring to the case of *Virginian R. Co. v. System Federation*, *supra*, the Supreme Court at pages 44 and 45, 57 S. Ct. at pages 628 said: 'We also pointed out that, as conceded by the government, the injunction against the company's entering into any contract concerning rules, rates of pay and working conditions except with a chosen representative was "designed only to prevent collective bargaining with anyone purporting to represent employees" other than the representative they had selected. It was taken "to prohibit the negotiation of labor contracts, generally applicable to employees" in the described unit with any other representative than the one so chosen, "but not as precluding such individual contracts" as the company might "elect to make directly with individual employees." We think this construction also applies to section 9(a) of the National Labor Relations Act.' " (p. 164.)

This court further held that the general authority of the spokesman for the Union did not include the power to waive the individual seniority rights of employees, as the matter of seniority primarily concerns the relation of the employees, not to the Company but to each other, the court saying:

"Upon the hearing a discussion arose between counsel representing the Union and respondent's at-

torney as to certain legal questions involved in the fixing of seniority rights. It was there and is here contended on behalf of respondent that negotiations between the Union and the employer ordinarily are with respect to general working conditions, hours of labor and wages, and such matters where the interests of all the employees are the same and where any advantage secured by the Union for one member inures to the benefit of all; but that this is not true with respect to the question of seniority where the interests of the older and the younger employees are directly in conflict. The existence of this legal phase of the controversy was admitted by Union counsel at the hearing. Moreover, as the evidence discloses, matters of seniority primarily concern the relation of the employees, not to the company, but to each other. Rights taken from those new in the service go to benefit the older employees in the company. Thus any change of seniority status established by the contract *would affect the personal rights of the individual employee rather than those of the group.*" (Emphasis ours.)

*N. L. R. B. v. Union Pac. Stages, Inc.*, 99 Fed. (2d) 153, 164-5.

The ~~Union's~~<sup>Brands'</sup> brief attempts to distinguish the *Union Pacific Stages* case (pp. 26-27, footnote), asserting that the distinction is that the Union had acquiesced in direct settlement. Also that in the present case the procedure contemplates dealing with an individual employee "concerning a matter covered by a collective bargaining contract affecting *all* of the employees."

Neither situation constitutes a distinguishing circumstance.

In the first place, the present contract expressly excludes individual grievance presentation from the operation of the contract Union grievance procedure; so that it may be equally said that the Union, in consenting to such exclusion of such individual grievance presentation from the provisions of Article V, has “acquiesced in direct settlement of a grievance.”

Moreover, the Union’s contention, in support of the Board’s jurisdiction, has been that the particular act complained of on the part of respondent, *i. e.*, giving notice of the method of handling individual grievances, was so heinous and so contrary to public policy, that the National Labor Relations Board was justified in stepping in and ousting the tribunal provided by the contract for settlement of such a dispute. If this is true, the Union could not give any validity to such a procedure by consenting thereto.

The basic question remains: Is direct employer-employee grievance settlement illegal? This court has expressly held that it is not.

In the second place, there was also a labor contract in existence between the employer and Union, covering *all* the employees, in the *Union Pacific Stages* case.

In a recent case *General Committee of Adjustment of the Brotherhood of Locomotive Engineers v. Southern Pacific Company* (C. C. A. 9), 132 Fed. (2d) 194, this court has pointed out very cogent reasons for allowing an employee to present and prosecute individually any griev-

ance claimed by him, and has shown the unfairness of requiring him to abide by the representation of a particular labor organization. This court said:

“The Engineers’ Committee contends that the engineer party suing on his individual contract with the Railway can ‘elect’ to have no labor organization representing him other than the Engineers’ Committee. The startling injustice of this contention appears from the following: Assume three engineers, each asserting that he is entitled by a seniority to have an engine on a certain run. The Railway has decided that A has the seniority. B and C each claims that he is the senior. This may involve a pure question of fact as to date of employment, or resignation and return, or other easily imaginable factual situations. It is destructive of the fundamental concept of representation in such a justifiable controversy that the engineers B and C, each claiming the other not entitled to the run, must have the Engineers’ Committee as his representative. Obviously the Engineers’ Committee cannot act for both.

“More aggravating circumstances can be added to this situation. Such as, that one of the two engineers having the claim against the Railway is a member of the Engineers’ Brotherhood in good standing, with his dues paid, and the other, not a member of the Engineers’ Brotherhood, has been its bitter opponent and critic. The relationship of confidence and trust necessary between a suitor and his representative would be entirely absent in the second case. . . .

“What the Engineers’ committee is contending is that instead of there being the above described three statutory steps in the process, there must be four steps. There would be three tribunals instead of two before whom he must litigate, the first being a union

of which he is not a member, in which he litigates his claim against a member of the Union. \* \* \*

“The Engineers’ Committee also contends that its position is aided by the provision of Section 2, Sixth, with respect to conferences with the employer, as follows: ‘Sixth. In case of a dispute between a carrier or carriers and its or their employees, arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, it shall be the duty of the designated representative or representatives of such carrier or carriers and of such employees, within ten days after the receipt of notice of a desire on the part of either party to confer in respect to such dispute, to specify a time and place at which such conference shall be held: . . .’ But in this it ignores the fact that Section 2, Fourth, provides that the engineer may confer individually or through his local representative, a provision which supersedes every other provision in the Act, including Section 2, Sixth. As seen in footnote 4, above, the Engineers’ Schedule contains no provision for representation in grievances arising from a claimed breach of the engineer’s individual employment contract.”

*Gen. Com. etc. v. Southern Pac. Co.*, 132 F. (2d) 194, 198-199.

In *N. L. R. B. v. Jones & Laughlin, etc. Corp.*, 301 U. S. 1, 44-45; 81 L. Ed. 893, 915-916, in reviewing its prior decisions under the Railway Labor Act, the court said:

“We also pointed out that, as conceded by the Government, the injunction against the Company’s entering into any contract concerning rules, rates of pay and working conditions except with a chosen

representative was 'designed only to prevent collective bargaining with anyone purporting to represent employees' other than the representative they had selected. It was taken 'to prohibit the negotiation of labor contracts generally applicable to employees' in the described unit with any other representative than the one so chosen, 'but not as precluding such individual contracts' as the Company might 'elect to make directly with individual employees.' We think this construction also applies to Sec. 9(a) of the National Labor Relations Act.

"The Act does not compel agreements between employers and employees. It does not compel any agreement whatever. It does not prevent the employer 'from refusing to make a collective contract and hiring individuals on whatever terms' the employer 'may by unilateral action determine.' The Act expressly provides in section 9(a) that any individual employee or a group of employees shall have the right at any time to present grievances to their employer. The theory of the Act is that free opportunity for negotiation with accredited representatives of employees is likely to promote industrial peace and bring about the adjustments and agreements which the Act in itself does not attempt to compel."

*N. L. R. B. v. Jones & Laughlin, etc. Corp.*, 301 U. S. 1, 44-45, 81 L. Ed. 893, 915-916.

In *Wilson & Co. v. N. L. R. B.* (C. C. A. 8), 759, Fed. (2d) 759, 763, the court said with reference to the requirements of collective bargaining:

"It obligates the employer to bargain in good faith both collectively and exclusively with the chosen representative of a majority of his employees with respect to all matters which affect his employees as a



class, including wages, hours of employment, and working conditions. *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 45, 57 S. Ct. 615, 81 L. Ed. 893, 108 A. L. R. 1352; *National Labor Relations Board v. Union Pacific Stages, Inc.*, 9 Cir., 99 F. (2d) 153, 159, 164. *It does not however, prohibit individual employees or groups of employees from negotiating with the employer concerning grievances."*

*Wilson & Co. v. N. L. R. B.*, 115 Fed. (2d) 759, 763.

The case of *Midland Steel Products Company v. N. L. R. B.* (C. C. A. 6), 113 Fed. (2d) 800, 803, is a direct answer to the Board's holding that the notice complained of constituted an improper solicitation of individual grievance presentation. The Board based its Cease and Desist Order upon a letter sent to the employees by the Company's Works Manager at the time of the Union's organization campaign, and containing the following:

"Under this act (The Wagner Act) you have the right to name anyone you choose to represent you. You do not have to join any organization.

"Our policy is to be fair to each employee in every way.

"I would appreciate your dropping in to my office at any time to discuss our future policies and your suggestions how to make this a happier and better plant in which to work."

The court said:

"Assuming that the Board was correct in regarding the last part of the letter as an appeal to individual bargaining, the Act does not prohibit this practice

National Labor Relations Board v. Sands Mfg. Co., 306 U. S. 332, 59 S. Ct. 508, 83 L. Ed. 682. We do not understand that the statute forbids the employer, where he is innocent of coercion, interference, or restraint, to suggest individual conferences with his men nor even to advocate the advantages which grow from individual conferences, nor do we understand that such a suggestion of itself constitutes an element of interference, coercion or restraint. . . . The phrase covers the abuse of relation or opportunity so as to corrupt or override the will, and it is no more difficult to appraise conduct of this sort in connection with the selection of representatives for the purposes of this Act than in relation to well-known applications of the law with respect to fraud, duress, and undue influence.

“This letter exerts no pressure. It does not express nor intimate the opinion of the employer as to the merits of unionization or of nonunionization, or as to the merits of any particular union or organization. It constitutes an effort to secure cooperation between the ‘front office’ and the workers themselves, that is, to secure one of the objectives of the National Labor Relations Act, which, as stated in its title, is ‘to diminish the causes of labor disputes.’

*Midland Steel Products Co. v. N. L. R. B.*, 113 Fed. (2d) 800, at 803, 804.

In *N. L. R. B. v. Gutmann & Co.* (C. C. A. 7), 121 Fed. (2d) 756, 759-60, the employer distributed a pamphlet to each of its employees, the 8th paragraph of which read as follows:

“Individual Bargaining.

“8. An employee cannot be compelled to select any other employee, group or organization to bargain

for him. Any employee is absolutely free to bargain for himself, and make his own individual arrangement concerning his employment on a basis mutually satisfactory to the management and himself."

In denying a petition for enforcement, the court held that this communication was not objectionable.

In the case of *Precision Castings Co. v. Boland*, 13 Fed. Supp. 877, 884 (D. C. N. Y.), the court said:

"It is true that the act requires the employer to bargain with representatives of the majority of the employees of any appropriate unit. It goes no further than that. *It does not preclude other employees from presenting their grievances and from being heard.*"

The case of *In re Shanty Shops, Inc., and Chain Service Restaurant Employee's Union* (N. Y.), 8 Labor Relations Reporter, page 840, cited by the Union at the hearing in Washington, is a direct holding in support of respondent's position.

In discussing the proviso of Section 704(7) of the New York Labor Relations Act to the effect that "employees, directly or through representatives, shall have the right at any time to present grievances to their employer," the court said:

"We believe that Section 704(7) is modified by all of Section 705 and not merely by the proviso to one subdivision thereof. It is clear from both the language of the proviso and its context in the above subdivision of Section 705 that the proviso *was intended by the Legislature merely to preserve the right of individual employees or minority representatives to*

*present grievances, where there exists a majority representative for the purposes of collective bargaining. The proviso, affording to employees or their representatives 'the right at any time to present grievances' qualifies the main body of a subdivision which arms majority representatives with exclusive bargaining power.*

*"It thus serves to restrict what otherwise might be a grant of unlimited power to a majority union, in the exercise of which individual or minority rights might be completely destroyed. The proviso further assures employers that they are free if they desire, to discuss grievances with individuals or minority representatives, even though a majority representative has been designated for the purpose of collective bargaining."*

**(d) The Cases Cited by the Board do Not Support Its Contention That Individual Grievance Presentation Is Prohibited.**

The quotation from *Humble Oil and Refining Company v. N. L. R. B.* (C. C. A. 53, 113 Fed. (2d) 85, 87, appearing at page 24, has to do, as appears from the face of the court's statement, with the binding effect of a labor union contract, and the term "bargain" is used with reference to the making of such a contract.

The statement appearing at page 25, quoted from the case of *N. L. R. B. v. Knoxville*, 124 Fed. (2d) 875, 881-2, refers, as the court carefully points out in its opinion, to bargaining by the collective agent "with respect to wages, hours, and other conditions of employment."

The only additional cases are the *National Licorice* cases, and other cases appearing at footnote 19, page 25. All these cases involved individual contracts exacted by the employer.

In the *National Licorice Company* case, the employee was required to agree not to demand a closed shop. Also the propriety of his discharge was not to be subject to arbitration.

In the *Highland Shoe, Inc.*, case, 119 Fed. (2d) 218, 221, footnote 20, page 27, the reference is to an employer bargaining with his employees individually concerning a wage reduction.

Accordingly, it is submitted that the decided cases have established, beyond dispute, the substantive right of the employee to present any grievance which he desires to present to his employer directly. This would be true even if the contract with the Union did not recognize any right of individual presentation. However, as we shall see in the succeeding point, the contract expressly reserves such right and leaves it free from any interference by the Union and any restrictions by the Union grievance procedure.

The employer is under the corresponding duty to hear and adjust such grievance, and, if a settlement can not be arrived at by mutual agreement, to provide for determination by an impartial tribunal.

In objecting, throughout its brief, that recognition of any right of grievance presentation by an employee would

seriously “undermine” or embarrass the Union, the Board overlooks the guiding principle enunciated by the decisions that the employee’s right to present grievances is a right which must be free from interference from either the Union or the employer.

The suggestions of the Board’s counsel to the effect that individual adjustment of grievances operates to the prejudice of the Union, or to limit the scope of the Union’s collective bargaining power (Br. p. 12), is an argument addressed entirely to the wisdom of the enactment. This issue, however, is solely within the legislative domain. The courts cannot deny effect to the proviso of Section 9(a) upon the ground that it might embarrass the Union, or possibly lead to difficulties in administration. Congress has given the individual the “parallel” or “dual” right of grievance presentation. The statutory right of individual grievance presentation is expressly recognized and enforced and withdrawn from the operation of the procedural method provided by Article V by the terms of the Union contract.

The right of the employee to refuse to join or act through a labor organization is of equal value, as this court has said, to the right to organize; and the individual rights of the employee against any interference, domination, or coercion by the Union are entitled to the protection of the Board.

In *N. L. R. B. v. Sterling Motors* (C. C. A. 9), 109 Fed. (2d) 194, 202, this court said:

“That is the right not to join or create or assist any labor organization at all, but to deal individually with the employer. What we have described above regarding the result of ‘normal relations and innocent communications’ between employers and employees properly may lead the latter to choose to remain unorganized. The Supreme Court construes a predeceasive statute for the protection of collective bargaining as not prohibiting the employer’s ‘entering into such contract of employment as it chooses, with its individual employee,’ *Virginia Ry. Co. v. System Federation No. 40*, 300 U. S. 515, 557, 57 S. Ct. 592, 604, 81 L. Ed. 789, and puts a like construction upon the National Labor Relations Act, *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 45, 57 S. Ct. 615, 81 L. Ed. 893, 108 A. L. R. 1352 . . .

“Each of these three rights is of equal value and in administering the National Labor Relations Act is entitled to the protection of the Board.”

To the same effect is:

*Valley Mould & Iron Corp. v. N. L. R. B.* (C. C. A. 7), 116 Fed. (2d) 760, 764.

III.

**By the Express Terms of the Contract Between the Company and the Union, the Grievance Procedure Therein Provided for the Determination of Grievances Through the Union Does Not Apply to Any Employees or Group of Employees Desiring to Invoke Their Right to Present Grievances to the Management Individually.**

By the agreement [R. pp. 11, 15] Article V, Subdivision (10) the Union expressly agreed that the provisions of the Article entitled Grievance Procedure which established a method of presenting and determining grievance through the Union should not

“be interpreted to prevent any employees or group of employees from presenting grievances to the management in accordance with the provisions of Section 9(a) of the National Labor Relations Act.”

The first nine subdivisions of Article V [R. pp. 11, 15] provide for adjustment of grievances through various steps beginning between the aggrieved employee and his foreman, or with his representative and his foreman, and continuing through the district steward and the plant grievance committee dealing with designated representatives of the management, and finally, by Article VI [R. pp. 15-18] the procedure for arbitration is fixed.

The Board has consistently refused to give any effect to Subdivision (10), by which is excepted from the operation of Article V, the employees' right of individual grievance presentation.

In fact, the Board has construed the contract directly *contrary* to the provisions of Subdivision (10) and would,



in effect, rewrite the contract to provide that the provisions of Article V *shall apply* to individual grievance presentation.

The Board states in its brief, page 16:

“Of course, the provisions of the collective contract establishing a grievance procedure, like the provisions covering any other appropriate subjects of collective bargaining, extend to *all* of the employees in the bargaining unit.”

But the provisions of the collective contract, even though it applies to all employees, expressly exempt from its operation the right of *any* individual employee to present grievances “to the management.”

Again at page 18, the Board states (footnote):

“But the Board’s construction of the proviso (referring to Section 9(a), insures such orderliness and uniformity; *it requires the parties to use the single system established by agreement* between the employer and the representative, except that employees are free to appear in person and without the representative, at each stage of the process.”

This is an explicit statement which can mean nothing less than that the Board has rewritten the contract between the Company and the Union to eliminate Subdivision (10) of Article V, and to insert instead thereof a provision that the “procedure or single system” set up by Article V shall be used by all employees, whether presenting grievances through the Union or individually.

The Board’s own statement shows the complete untenability of the Board’s position.

The only justification attempted for the violence done to the contract of the parties is the suggestion that all grievances, including individual grievances, must be disposed of in accordance with the contract provisions, and all the precedents and interpretations established by the contract grievance procedure rulings.

Even if the Board or the court were free to thus rewrite the contract and impose upon the parties a totally different contract from that which was entered into, we submit that the attempted justification is wholly futile. Uniformity of determination is not an end in itself. Furthermore, uniformity of determination is not assured, even by the contract grievance procedure.

Finally, there can be no presumption that any determination through arbitration or otherwise, as provided by the notice complained of, will be an illegal and incorrect or an unjust determination. Much less can there be any presumption that it will be contrary to or different from other interpretations or rulings obtained through use of the contract grievance procedure.

Of course, if the Union feels aggrieved by any action taken by the Company in connection with the provision for hearing of individual grievances or by reason of any determination had upon any hearing of such individual grievances, whatever legal grievance the Union might sustain would be remediable under the procedure for arbitration provided by the terms of the contract. These provisions the Union has not seen fit to invoke in the present case.

The Board's solicitude on behalf of universal enforcement of the Union grievance procedure provisions of Article V, in defiance of the Union contract exemption of

Subdivision (10), is attempted to be justified in the Board's decision, and in its brief, by the contention, piously made (pp. 13-17), that a grievance procedure is "an appropriate subject" of collective bargaining. It is pointed out that it is very important that an effective grievance procedure be established; that this is just as important as having an efficient judicial system in society generally.

All this may be conceded, but there is no suggestion whatever in the record, or in the Board's brief, that there is anything unfair or unjust, inappropriate, inefficient, or otherwise objectionable, in the grievance procedure suggested by the notice upon which the complaint is based. The various contentions advanced (App. Br. pp. 11-17) with reference to the importance of the grievance procedure must fall before this obvious record fact; and if the provisions of the contract, Subdivision (10) of Art. V are to be given effect, the contentions of the Board, which are in direct antithesis to this subdivision, must be rejected.

But the Board's solicitude for the establishment of a proper grievance procedure is revealed at page 28 of the brief as based not upon any suggestion of unfairness or inadequacy of the method provided for disposition of individual grievances, but rather upon the claim that the system suggested might conceivably be demonstrably more efficient than the corresponding Union procedure, so that the employees would prefer it to the Union procedure!

At page 28, footnote 21, by way of illustration, it is stated:

"Thus, respondent might, for example, establish a grievance procedure for presentation of individual

grievances which provided for submission of grievances directly to the highest officials of respondent and thereafter to a committee of three non-supervisory employees in the department involved. The destructive effects upon the Union's representative status which would inevitably flow from such a course require no elaboration; employees could scarcely be expected in such circumstances to use the Union as their representative."

Here we have an unabashed confession of the Board's paramount interest in the welfare of the Union as an end in itself, regardless of the interests of the employees, overlooking again the principle enunciated by this and other courts that the purpose of the National Labor Relations Act was not to furnish a vehicle for the exploitation of the employee even by the Union, but that the right of non-association is of equal importance with the right of association and must be equally protected by the Board.

*N. L. R. B. v. Sterling Motors* (C. C. A. 9), 109 Fed. (2d) 194, 202.

But the record in the present case is a direct refutation of the hypothesis suggested by the Board. The offer of proof which the Board rejected, but which they finally assumed to be true, was that only two instances of individual grievance determination had, occurred, as against more than 800 through the Union procedure. Finally, in order to support the order of the Board on this basis some pleading or proof of favoritism was necessary which was not attempted in the present case, the Board consistently refusing to consider any evidence as to the operation of the grievance procedure. [R. pp. 146-147.]

IV.

**The Right to Present Grievances Individually Involves a Corresponding Duty Upon the Part of the Company to Receive, Hear, and Adjust the Grievances by Arbitration, if Necessary, i. e., by the Utilization of a Reasonably Fair and Effective Procedure.**

Both by contract and by statute, the individual employee or any group of employees have a right to present grievances to the management. This right, as we have seen, is not limited to the mere filing of the claim. (Point II, *supra*.)

**The Statutory Right and Also the Contract Right Granted to Employees to Individually Present Their Grievances to the Employer Involves the Corresponding Duty on the Employer to Hear and Adjust Such Grievances.**

The duty to deal involves the right to insist on dealing.

In *Grace Co. v. Williams* (D. C. Mo.), 20 Fed. Supp. 263, 266, the court said with reference to the duty of an employer to deal with the representative of the employees:

“the imposition of the duty must of necessity carry with it the right on the part of the employer to insist upon and enforce, if necessary, its right to perform that duty.”

This, again, is the direct holding of the case of *National Labor Relations Board v. Union Pacific Stages* (C. C. A. 9), *supra*, 99 Fed. (2d) 153, and other cases cited *infra*, subdivision (c), Point II.

“ . . . ‘right’ and ‘obligation’ are correlative terms.”

*City v. Prestonettes, Inc.*, 285 Fed. 501, 514 (C. C. C. A. 2, 1922).

Right as used in the legal sense

“implies something with which the law invests one person, and in respect to which, for his benefit, another, or perhaps all others, are required by the law to do or perform acts . . . .”

*Galveston H. & S. A. Ry. Co. v. Hennigan*, 76 S. W. 452 (Tex., 1903).

It is an elemental rule of statutory construction that the grant of a power or right

“carries with it, by implication, everything necessary to carry out the power or right and make it effectual and complete.” (59 *Corpus Juris*, p. 973.)

*Dooley v. Penna. Ry. Co.* (D. C. Minn.), 250 Fed. 142, 143.

V.

The Necessity of Providing for Such a Hearing and Determination Justifies, and in Fact, Necessitates, as a Practical Matter, the Giving of a Notice Setting Forth the Date, Place and Manner of Hearing and Determination of the Grievance.

The Company, in order to comply with its contract and statutory duty of hearing and determining individual grievances, could properly designate representatives to hear the grievance, fix a time and place of hearing, and make any other fair or reasonable arrangements for the disposition of the grievance. Certainly if the Company was authorized to fix such reasonable arrangements, it was equally authorized to give notice thereof. In fact, in a concern involving as many employees as respondent, it may be said that in the duty to hear such grievances is implicit the duty to give due notice to the employees of any arrangements made for the disposition of individual grievances.

The Board has cited no authority, and has made no argument to the effect that the giving of notice of the arrangements for individual grievance presentation and determination as distinct from the fixing of such procedure is objectionable.

As was stated in *Grace Co. v. Williams* (D. C. Mo.), 20 Fed. Supp. 263, 266, the imposition of the duty to deal "must of necessity carry with it the right on the part of the employer to insist upon and enforce, if necessary, its right to perform that duty."

The right to give notice of a procedure for receiving and passing upon individual grievances is incident to the duty to receive and pass thereon.

The situation is analogous to that of the rule-making power of the courts or other administrative tribunals.

In the case of *Byers v. Smith*, 4 Cal. (2d) 209, 213, the court stated that the principle appearing in C. C. P., Section 187, constituted "a well-known rule of law." That principle is:

" 'When jurisdiction is, by the constitution or this code or by any other statute, conferred on a court or judicial officer, all the means necessary to carry it into effect are also given; and in the exercise of this jurisdiction, if the course of proceeding be not specifically pointed out by this code or the statute, any suitable process or mode of procedure may be adopted which may appear most conformable to the spirit of the code.' "

The right of grievance presentation requires that an opportunity for presentation be afforded, and such opportunity is not afforded until and unless notice thereof is given.



VI.

Any Objection as to the Scope or Terms of the Notice Stating the Method of Determination of Grievances Is Not Available Upon This Proceeding, Because There Was No Pleading or Proof That the Method Suggested Was Improper, or That Other Grievances Than Those Properly Determined Individually Were Heard and Passed Upon.

As we have seen the complaint was based entirely upon the charge that the notice to the employees was given without the knowledge or consent of the Union, and provided for a determination of grievances without the Union's knowledge, consent, or participation. [R. p. 4.] There was no issue whatever as to the *scope* or terms of the notice; likewise there was no proof as to such scope permitted by the Board.

Also, there was no issue as to the propriety of the provision for arbitration, which the Board in its decision seems to regard as invalidating the procedure. In any and all events, it is submitted that there is no limitation in the Act as to the type of grievances which an individual may present; likewise there is no such limitation in the contract; and that a provision for arbitration does not, under any conceivable circumstance, vitiate the procedure.

**(a) There Is No Issue as to the Scope of the Grievances Covered by the Notices Complained of.**

The complaint was not that the notice provided for the hearing of other grievances than those properly presentable by the individual employee, but that the notice was distributed without consultation with the Union, and provided for determination of grievances without the Union's knowledge, consent, or participation. In other words, it was not the type of grievance, but the "unilateral" dissemination of the notice and the fact that the procedure did not provide for Union participation. There is no other ground of objection stated in the complaint, and no other ground is available in this court in support of the order of which enforcement is sought.

Under the complaint it is the establishment of an individual bargaining procedure, regardless of the scope of the matters contemplated, which is the basis of the charge. The theory of the complaint is that there is no right of individual grievance presentation whatever except such as the Union may bestow.

The Board, throughout, has ignored the provision of the contract which guarantees the right of individual grievance presentation without interference from the Union, and without regard to the provisions governing Union grievance procedure.

(b) Even if There Were Any Issue as to the Scope of the Notice, Which There Is Not, There Was No Proof That Any Grievances Not Properly Presentable Were Actually Presented.

In fact, there was no proof that any grievances at all were presented under this procedure. The Company's offer of proof as to grievances referred to was rejected. [R. pp. 146-7.]

It cannot be assumed, in the absence of evidence, that the law has been or will be violated, but on the contrary, there is a presumption that the law will be obeyed.

In the Board's brief, pp. 21-28, it is suggested that "there are no limitations upon the nature or type of grievances which may be submitted by individual employees." (p. 21.)

Again we point out that there was no charge that the notice was illegal because it contained no limitations.

We call attention, also, to the fact that the Board has failed to show just *what limitations* should be imposed in order to comply with the law and the contract. No authority has been cited, and none exists, which imposes any limitation whatever upon the type of grievances which may be presented individually by the employee.

(c) **There Is No Limitation in the Act, or in the Labor Contract, as to the Character of Matters Which May be Presented as Individual Grievances, and No Limitations Can be Interpolated by the Board or the Court.**

The Board concedes in its decision, and states in its brief, that “individuals may present grievances \* \* \*” (p. 22), but there is an entire absence of any indication of the Board’s position as to the scope of grievances properly presentable by an individual.

The suggestion is offered (p. 23) that whatever grievances are presented by the individual employees must be settled in accordance with contract provisions, or in accordance with the precedence and interpretations arrived at through the rulings on the grievances presented by the bargaining representative. The Board makes a similar statement in its decision. [R. pp. 62-63.]

Neither the decision of the Board nor its brief gives any clue to the nature of grievances which they consider would be properly presented by an individual. As we have seen, the suggestion that they must be settled in accordance with the precedents arrived at through the Union grievance procedure is entirely unsupported.

Even if true, it would be immaterial in the present controversy. There is no issue as to whether or not any individual grievance has been or will be settled in accordance with any particular precedent or set of precedents, nor can there be any such issue, as there is no pleading or proof of any particular determination.

It is submitted that Congress used the term “grievances” in its usually accepted sense, and in reserving the right to an individual employee or group of employees “*at any time to present grievances to their employees*” it

did not impose any qualification or limitation on the type of grievances. The same is true of subdivision (10) of Article V.

The language of the Act is not subject to any interpretation which would limit the right of individual grievance presentation to any particular type.

The suggestion that the congressional hearings indicate an intention to limit the right of individual grievance presentation appearing in the Board's brief (pp. 24-27), is immaterial in view of the fact that *there is no ambiguity in the language used.*

If the right of individual grievance presentation, as the Board suggests in its brief, p. 12, is a delimitation of the right of collective bargaining, then it is undeniable that such delimitation is exactly what Congress expressly provided, and the argument of the Board is one which should be addressed rather to Congress than this court.

Neither the Board nor the courts can deny effect to the proviso of Section 9 (a) upon the ground that it might embarrass the Union or possibly lead to difficulties in administration. That the ruling in the case of an individual grievance might not accord with other rulings made under the Union grievance procedure is not an argument against the right of individual grievance presentation nor, as stated, is such right debatable. The Union has ample recourse under the ordinary grievance procedure to satisfy any legal prejudice or detriment which it might sustain; but the protection of the Union in the right of collective bargaining does not require the denial of individual grievance presentation.

**(d) The Fact That a Method of Individual Grievance Presentation Provides for Settlement by Arbitration Does Not Render the Procedure Illegal or a Violation of the National Labor Relations Act.**

It was the Board's opinion that the individual grievance procedure suggested was entirely vitiated by the bare fact that it contained a provision for settlement by arbitration. [R. pp. 29, 30, 35, 36, 37.]

Apparently the Board does not rely upon this contention in its brief, but merely suggests that the decisions on individual grievances must be in accordance with the precedents and interpretations obtained in rulings on the Union grievance procedure; and in connection with this observation, the Board's brief suggests that the notice complained of would permit the disposition of grievances "by respondent unilaterally, or by an arbitrator," as though this carried some sort of a stigma of illegality.

We repeat that it would be idle to provide for presentation of grievances without authorizing or requiring that such grievances be finally determined. Determination by arbitration is the commonly accepted method, not only in the case of labor relations, but in all similar business transactions. The right of collective bargaining and the Union's contention with respect to any particular issue cannot possibly be affected in any way by any arbitration which may be had on an individual grievance. These rights remain identically the same as though no arbitration had been had as to an individual grievance, and exactly the same as though no provision were made for arbitration of individual grievances.

The effect on the Union of settlement by arbitration would be the same—no more and no less—if the grievance were adjusted by mutual discussion directly between employer and employee.

Again we suggest that the only substantial or meritorious question is whether provision is made for a fair and just determination of the grievance; but in this case neither the Union nor the Board are at all interested in this matter, and there is no issue with respect thereto.

If the employer and employee can mutually agree between themselves upon a particular settlement or disposition of a grievance, it would equally follow that they can agree to abide by a settlement fixed by a third party; and, in fact, it would appear that less interference with the Union's asserted domain would result if all grievances individually presented were settled exclusively by the method of arbitration. It is submitted that the mere addition of a provision for reference to an arbiter in the event of failure of attempts at mutual adjustment cannot transform a legal plan of individual grievance handling into illegal "bargaining" in contravention of any right of the Union.

**(e) The Notice Complained of Is Not Objectionable as Improper Solicitation of Individual Grievance Presentation.**

The Board's decision states that the individual grievance procedure method "was referred to as the Company's policy," and that this constituted an implication that respondent preferred the individual grievance procedure, and was inviting employees to use it rather than the contract procedure. [R. p. 64.] The same statement is repeated in the Board's brief, pp. 3, 8, 27, 28.

This oft-repeated charge has no more substantial basis than the opening sentence of the notice, which reads as follows:

"In accordance with the National Labor Relations Act and the policy of North American Aviation, Inc., every employee has the privilege of presenting his grievances directly to the management."

This is nothing more or less than a statement that the Act of Congress and the policy of the Company both provide for individual grievance presentation. The statement with reference to the provision of the Act is incontestably true. The statement that it is the policy of the Company to give effect to the privilege granted by the Act is certainly not unfair labor practice.

Indeed, the complaint did not charge any unfair labor practice in this respect, or any solicitation of individual grievance procedure, or show any facts indicating that any employee had been deceived or had supposed that any preference was intended. Even if the contention of the Board in this respect were supported by the record, which it is not, the issues are framed by the complaint and must be determined thereon. There was no issue of solicitation or coercion of employees in any particular whatever, or of any illegal favoritism; and even if such an issue had been raised, it is clear under the cases that the notice complained of was much less objectionable in these respects than the notices discussed in cases referred to in Point II, *supra*.

*Midland Steel Products Company v. N. L. R. B.* (C. C. A. 6), 113 Fed. (2d) 800, 803;

*N. L. R. B. v. Gutmann & Co.* (C. C. A. 7), 121 Fed. (2d) 756, 759-60.

**(f) There Is No Issue in the Present Case as to the Scope of Individual Grievance Presentation, as Distinct From Collective Bargaining.**

The Board's decision, likewise its brief (pp. 13 and 14, and throughout), condemns individual presentation of grievances as an encroachment upon the Union's domain of collective bargaining. This is attended by a process of extending the definition of collective bargaining to include any adjustment of any grievance, thus distorting the mean-



ing of the term of "collective bargaining" as used in the statute.

As this court has held, the procedure for individual grievance adjustment

"is entirely consistent with collective bargaining in matters affecting employees as a class." (*Union Pacific Stages* case, *supra*.)

Collective bargaining is ordinarily used in the sense of denoting the process by which an agreement is arrived at. Grievance procedure involves, not the question of new contractual relations, but simply the matter of whether there has been a breach of existing contractual or other duty and the measure of redress therefor.

Webster's Dictionary defines the term collective bargaining as:

"Negotiation for the settlement of the terms (for example, as to wages) of a labor contract between an employer or group of employers on the one side and an organized body of workers on the other."

The same authority defines a grievance as:

"Cause of uneasiness and complaint; wrong done and suffered."

Regardless of the proper definition of the term, the notice itself did not contemplate the hearing of any grievances not properly presentable individually. In fact, the reference is to such grievances as the employee may present "in accordance with the National Labor Relations Act." There is no proof, and it cannot be assumed, that the employer has determined any grievances not properly presentable by the individual employee.

There was no issue as to the scope of the grievances covered by the notice, and no proof was permitted as to

the character of grievances which had been actually had pursuant thereto.

Finally, we submit that the order of the Board can not be sustained except by holding that it is illegal to establish a procedure for direct handling of individual grievances. This is the sole charge contained in the complaint. There is no issue as to the scope of grievances properly presentable, nor is there any issue as to the legality or illegality of the method established for handling the procedure. The sole issue is can *a* direct procedure be legally established without the consent of the Union.

As stated by the United States Supreme Court in the case of *United States v. Gilmore*, 7 Wall. 491, 19 L. Ed. 292, 293:

“The object of pleading is to concentrate the controversy upon the questions of fact and of law, which should control the result. The value of the system in the administration of justice can hardly be too highly estimated.”

To the same effect is

*Reed v. Munn* (C. C. A. 8), 149 Fed. 737, 743.

VII.

The Order of the Board Is Too Broad.

The sole issue is the propriety of the giving of notice of the method for handling individual grievances, without the consent of or consultation with the Union. On the present record the Board can only direct the recall of the notice. It cannot even direct a modification of the notice as there was no issue as to the scope of the notice.

*N. L. R. B. v. Express Pub. Co.*, 312 U. S. 426, 435-6; 85 L. Ed. 930, 937;

*Bethlehem Steel v. N. L. R. B.* (C. C. A. D. C.), 120 Fed. (2d) 641, 707-8.

As stated in *N. L. R. B. v. Express Pub. Co.*, 312 U. S. 426, 435-6, 85 L. Ed. 930, 937:

"A Federal court has broad power to restrain acts which are of the same type or class as unlawful acts which the court has found to have been committed or whose commission in the future, unless enjoined, may fairly be anticipated from the defendant's conduct in the past. But the mere fact that a court has found that a defendant has committed an act in violation of a statute does not justify an injunction broadly to obey the statute and thus subject the defendant to contempt proceedings if he shall at any time in the future commit some new violation unlike and unrelated to that with which he was originally charged. This Court will strike from an injunction decree restraints upon the commission of unlawful acts which are thus dissociated from those which a defendant has committed. \* \* \* The breadth of the order, like the injunction of a court, must depend upon the circumstances of each case, the purpose being to prevent violations, the threat of which in the future is indicated because of their similarity or relation to those unlawful acts which the Board has found to have been committed by the employer in the past."

### Conclusion.

The order for which enforcement is sought requires respondent to cease and desist from refusing to bargain collectively with the Union, and requires respondent, upon request, to bargain collectively with the Union. [R. pp. 68-69.]

But there is no charge in the complaint and the evidence shows that there is no basis for any charge that respondent ever refused to bargain collectively with the Union at any time about any matter whatever. Paragraphs 1.(a). and 1.(c). and 2.(a). [R. pp. 68-69] of the order are therefore null and void upon the face of the record.

The only charge of refusal to bargain collectively is that the giving of the notice complained of amounted to a refusal to collectively bargain; and this is the only charge upon which the order can be based. However, the record shows that respondent was willing to negotiate with the Union the question of the propriety of the issuance of such notice, and did, in fact, do so up to the final step of the grievance procedure. It was the Union that refused to negotiate further. The employer has always been willing to negotiate in the matter. The portion of the order which would require the employer to declare the notice null and void and announce that it would give no effect thereto [R. pp. 68-9], would relieve the Union from its contractual obligation to negotiate any dispute with reference to the propriety of the notice.

Respondent would be rendered powerless to put into effect any method for handling of grievances presented in-

dividually under Section 9(a) of the Act, or under Article V, Subdivision 10 of the contract, except with the Union's consent. The result would be the effectual repeal of the proviso to Section 9(a)—the accomplishment of which is undoubtedly the purpose of the present proceedings—and the rewriting of the contract between the parties by which the Union grievance procedure is expressly made inapplicable to individual grievance presentation.

It is respectfully submitted that the direct and unequivocal reservation to the individual employee of the right to individually present grievances, which reservation appears both in the statute Section 9(a), and in the contract, must be given a reasonable construction, and one which will afford the employer an effective and practical means of obtaining redress, as to any and all grievances, without interference from the Union; that the fulfillment of its duty to receive such grievances enforces upon the employer the obligation to give reasonable opportunity of presentation and notice to employees thereof.

The notice complained of constituted nothing more nor less than affording an opportunity for individual grievance presentation. It is not charged that the opportunity thus given is otherwise than full and fair. The only criticism in the complaint is that (1) the opportunity for a hearing was granted without the consent of the Union, and (2) that provision is made for the privilege of a hearing without Union participation.

It is respectfully submitted that the foregoing issues have already been authoritatively determined in accordance

with respondent's position herein by the decisions of this court.

It is therefore respectfully submitted that the order of the Board is null and void and its enforcement should be denied.

Respectfully submitted,

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IRA C. POWERS,

*Of Counsel.*

No. 10313

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**In the United States Circuit Court of Appeals  
for the Ninth Circuit**

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**NATIONAL LABOR RELATIONS BOARD, PETITIONER**

*v.*

**NORTH AMERICAN AVIATION, INC., RESPONDENT**

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**ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD**

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**REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS  
BOARD**

---

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**FILED**

**MAR 29 1943**

**PAUL P. O'BRIEN,**  
**CLERK**





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(I)



**In the United States Circuit Court of Appeals  
for the Ninth Circuit**

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No. 10313

NATIONAL LABOR RELATIONS BOARD, PETITIONER

*v.*

NORTH AMERICAN AVIATION, INC., RESPONDENT

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*ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD*

---

**REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS  
BOARD**

In its brief respondent has in some respects seriously distorted the Board's position. Moreover, it has made certain contentions which were not anticipated by the Board or fully discussed in the Board's main brief. This reply brief is submitted in order to avoid any confusion of the Court as to the Board's position, which may result from respondent's brief, and to present the Board's argument as to such new matters as we think require further discussion in light of respondent's brief.

1. Respondent contends first (pp. 9, 18-22), in effect, that the Board's findings as to unfair labor practices and its order, are improper because of the contract between respondent and the charging union, which calls

for arbitration of disputes between the parties. But this contention, it is apparent, is essentially the same as that which respondent made before the Board, to the effect that the Board could not properly find that respondent violated the Act, because respondent's contract with the Union prohibits strikes and lock-outs and, it was argued, because respondent's conduct therefore may not be said to lead or tend to lead to labor disputes burdening or obstructing commerce (Brief to Board, pp. 25-28).

This argument, as we have pointed out in our main brief (note 2, pp. 2-3), is foreclosed by the Congressional finding in Section 1 of the Act as to the crippling effects of unfair labor practices upon commerce, and by Section 10 (a) of the Act, which provides that the power of the Board to prevent such unfair labor practices shall be "exclusive" and "shall not be affected by any other means of adjustment or prevention \* \* \*." An essentially similar contention to that which respondent now advances was made to the Third Circuit and rejected by that Court in a carefully considered opinion on rehearing *en banc* in *N. L. R. B. v. Newark Morning Ledger Co.*, 120 F. (2d) 266, cert. denied 314 U. S. 693.

2. Respondent also suggests at various points in its brief that under the Act employees may individually present and prosecute grievances "to a final settlement, and without interference from the Union" (pp. 11-12, 23-36; see also pp. 45-46); that the "basic question" is whether "direct employer-employee grievance settlement [is] illegal" (p. 29); and that it is the Board's

position "that individual grievance presentation is prohibited" (pp. 36-38).<sup>1</sup> Respondent has distorted the Board's position. Contrary to respondent's contention, the Board maintains that the proviso to Section 9 (a) means precisely what respondent here apparently argues it means: that individual employees "shall have the right at any time to present grievances to their employer" (Section 9 (a) of the Act; Bd. Brief, pp. 17-18, 20-21, 22-23; see, also R. 60, 61, 63). And the Board expressly stated in its decision, as we have pointed out in our main brief (Board Brief, p. 23, note 16), that the right of employees to present grievances implies the right of the employer "to receive and act upon" them (R. 60.)<sup>2</sup> Accordingly it is clear that the Board made no argument such as respondent has painfully sought to refute.<sup>3</sup>

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<sup>1</sup> See also p. 56 of respondent's brief where it asserts that the "Board's decision, likewise its brief (citing pages), condemns individual presentation of grievances as an encroachment upon the Union's domain of collective bargaining."

<sup>2</sup> Of course, the grievance must be disposed of in accordance with the collective contract which establishes the terms and conditions of employment of *all* employees. And questions as to interpretation of the agreement must be determined by bargaining with the exclusive representative. See pp. 13, 22-23 of our main brief.

<sup>3</sup> The cases which respondent has cited in support of its position (Resp. Brief, pp. 29-36) hold no more than this. Insofar as these cases may suggest that individual bargaining is permissible under the Act despite the selection of a collective bargaining representative, they are plainly inconsistent with the majority rule principle enunciated in the Act and the Congressional intention. See our main brief, pp. 20-21, 23-26. The Seventh Circuit has recently so decided in a case where the issue was squarely presented. *N. L. R. B. v. J. I. Case Co.*, decided February 26, 1943, 12 L. R. R. 60. See, also, *Western Cartridge Co. v. N. L. R. B.*, decided March 1,

On the other hand, the position which the Board does take in its decision and brief, respondent has failed to refute in any essential respect. This position is fully set out in our main brief at pp. 13-18, 28-29. Briefly restated, it is that the establishment of a *grievance procedure* is an appropriate and indeed vital subject of collective bargaining since the grievance procedure is in a sense the judicial system under which the industrial enterprise affected operates; it is by recourse to it rather than to industrial strife, that disputes as to wages, hours, seniority, and all other conditions of employment normally will be determined.<sup>4</sup> An employer may not consistently with acceptance of the collective bargaining principle, after the employees have selected a collective bargaining representative which, as the agent of *all* the employees, has negotiated a grievance procedure, unilaterally establish a separate grievance procedure for presentation of grievances by individuals. The proviso to Section 9 (a) merely grants employees the right to *present and prosecute grievances individually and without any representative*, if they choose to do so. It has nothing to do, however, with establishment of the judicial system of the industrial enterprise; this still remains a subject of collective

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1943, 12 L. R. R. 79 (C. C. A. 7). Cf., also, *N. L. R. B. v. Montgomery Ward & Co.*, decided February 15, 1943, 12 L. R. R. 23, wherein this Court held that an "attempt to deal individually with the employees at a time when a strike was in progress, apparently the result of unproductive efforts in collective bargaining, is within the prohibition of Section 8 (1) of the Act." 12 L. R. R. at p. 24.

<sup>4</sup> Respondent states in its brief (p. 43) that "all this may be conceded."

bargaining, although employees may litigate in it *in personnas* if they prefer.

3. Respondent also argues (pp. 13, 40–44; see also, p. 29) in effect that the Union in its contract with respondent has consented to establishment of a separate procedure for individual grievances, and that the Board has “rewritten” the contract so as to “eliminate” this provision of the agreement (p. 41). It is difficult to believe that respondent makes this argument seriously.

Article V, Subdivision (10) of the contract, upon which respondent relies, provides merely that (R. 15):

No provision of this Article shall be interpreted to prevent any employees or group of employees from presenting grievances to the management in accordance with the provisions of Section 9 (a) of the National Labor Relations Act.

The provision is unambiguous: clearly, all that it means is that employees may present grievances to the management, as permitted by Section 9 (a) of the Act. What Section 9 (a) means is left wholly undetermined. Plainly, the Union did not thereby agree, as respondent in effect suggests, to a construction which, as we have demonstrated in our main brief (pp. 19–28, 29), seriously limits the Union’s authority as the exclusive bargaining agent and threatens to undermine the entire collective bargaining process. Indeed, the Union rejected a far less damaging provision during the negotiations, whereupon the present provision was agreed upon, on the suggestion of respondent’s counsel, as a “compromise” (R. 98–99).

4. Respondent argues further (pp. 15, 47–48), in substance, that the right of employees to present grievances individually necessarily carries with it a right to respondent to “give notice of a procedure for receiving and passing upon individual grievances” (p. 48). But the issue is whether respondent was free to establish unilaterally a separate grievance procedure, such as it did, for individual grievances. Respondent’s contention, of course, does not meet this issue. Moreover, as we have pointed out in our main brief (note 3, p. 18), the Board’s construction of the proviso insures an orderly and uniform presentation of individual grievances pursuant to single procedure—that established by collective bargaining; respondent does not suggest why it is “necessary” to have a separate procedure, unilaterally instituted by respondent, for such grievances.

5. Respondent’s suggestion (pp. 16, 49–58) that the Board’s findings, in some respects, are outside the limits of the pleadings and proof, is equally meritless. The complaint plainly alleged that respondent, during the term of a collective bargaining contract containing provision for a grievance procedure, unilaterally established a stated separate grievance procedure for individual grievances and issued a stated notice to its employees advising them of such separate procedure;<sup>5</sup> and that “by its issuance of said notice and its establishment of said [separate] procedure,” respondent violated Section 8 (5) and (1) of the Act (R. 4–5).

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<sup>5</sup> The notice setting forth the procedure was attached to the complaint as an exhibit (R. 4, 21–22).



These allegations, we submit, clearly embrace the Board's findings, and the issues raised by them were fully litigated, as the record shows.

Moreover, it is well settled that the Act does not "contemplate or require pleadings to meet the exacting standards of a court of law. \* \* \* All that is required of the complaint in such proceedings is that it shall state facts which shall enable the respondent to understand the offense which it is alleged the respondent has committed under the Act, and to understand the issue it will be required to meet. *N. L. R. B. v. Sunbeam Electric Mfg. Co.*, decided February 6, 1943, 11 L. R. R. 798, 799 (C. C. A. 7). The pleadings here fully performed this function.

6. Other contentions made by respondent are, we submit, specious on their face or fully discussed in our main brief, and require no elaboration here.

Respectfully submitted.

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MARCH 1943.

*Argued by Mr. Ricorson.*



No. 10333

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United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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JAMES P. HART, Trustee of International Mining & Milling  
Company, a corporation, Debtor and Mount Gaines Min-  
ing Company, a corporation, Debtor,

Appellant,

vs.

CALIFORNIA PACIFIC TITLE AND TRUST COMPANY, a  
corporation, TITLE INSURANCE AND GUARANTY  
COMPANY, a corporation, HUMPHREY ESTATES,  
INC., a corporation, HARRY LEE JONES, ARTHUR J.  
EDWARDS, D. R. GUSTAVESON, JAMES S. HAZEN,  
PERSIS E. HAZEN, BYRON HALVERSON and  
JOSEPH J. MUELLER,

Appellees.

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Transcript of Record

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Upon Appeal from the District Court of the United States  
for the District of Nevada

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PAUL P. O'BRIEN,  
CLERK



United States  
Circuit Court of Appeals

For the Ninth Circuit.

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JAMES P. HART, Trustee of International Mining & Milling  
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Appellant,

vs.

CALIFORNIA PACIFIC TITLE AND TRUST COMPANY, a  
corporation, TITLE INSURANCE AND GUARANTY  
COMPANY, a corporation, HUMPHREY ESTATES,  
INC., a corporation, HARRY LEE JONES, ARTHUR J.  
EDWARDS, D. R. GUSTAVESON, JAMES S. HAZEN,  
PERSIS E. HAZEN, BYRON HALVERSON and  
JOSEPH J. MUELLER,

Appellees.

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Transcript of Record

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Upon Appeal from the District Court of the United States  
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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California Pacific Title & Trust  
Company, and Title Insurance and  
Guaranty Company

MESSRS. HALVERSON & HALVERSON

611 Financial Center Building,  
Los Angeles, California,

For Respondents and Appellees,  
Byron Halverson and Joseph J.  
Mueller.

D. R. GUSTAVESON, ESQ.,

In Pro. Per.,

1023 Associated Realty Building,  
510 West Sixth Street,  
Los Angeles, California. [1\*]

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\*Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States  
For the District of Nevada

No. A-34-A

In the Matter of

INTERNATIONAL MINING & MILLING COM-  
PANY, a corporation,

Debtor.

In Proceedings for Reorganization of a Corporation.

No. A-35-A

In the Matter of

MOUNT GAINES MINING COMPANY, a cor-  
poration,

Debtor.

In Proceedings for Reorganization of a Corporation.

PETITION FOR ORDER TO SHOW CAUSE

Now Comes James P. Hart, the duly appointed, qualified and acting Trustee of the above named corporations in reorganization under Chapter 10 of the Bankruptcy Act of the United States, and respectfully petitions this Court for an order to show cause directed to the California Pacific Title and Trust Company, the Title Insurance and Guaranty Company, Humphrey Estates, Inc., Harry Lee Jones, Arthur J. Edwards, D. R. Gustaveson, James S. Hazen and Persis E. Hazen, Byron Halverson, and Joseph J. Mueller, why they have failed and

refused to convey to the Mount Gaines Mining Company the title to three-fourths of those certain mining properties mentioned and set forth in the lease and option given by J. W. Humphrey to Carl W. Yates and J. E. Binns on December 16th, 1933, the predecessors in interest of the said California Pacific Title and Trust Company and the Title Insurance and [2] Guaranty Company, and to account for all moneys received by the said California Pacific Title and Trust Company and Title Insurance and Guaranty Company, or either of them, and for the payment to this Trustee of all sums received by either one of said Trustees, California Pacific Title and Trust Company or Title Insurance and Guaranty Company, and their beneficiaries, over and above the amount due for the purchase of the undivided three-fourths interest of said mining claims, and for grounds of such order respectfully shows:

That on the 16th day of December, 1933, J. W. Humphrey, the legal owner of certain mining claims situate in Mariposa County, State of California, made and executed a lease for ten years to said mining claims to Carl W. Yates and J. E. Binns, and at the same time included in said lease to the said Yates and Binns an option to purchase an undivided three-fourths interest in all of said mining claims, said option being as follows:

“Said Owner, for and by the considerations and agreements herein therefore grants unto the lessees an option to purchase an undivided

three-fourth ( $\frac{3}{4}$ ) interest in said mine, property and all appurtenances thereto for the sum of Fifty Thousand Dollars (\$50,000.00) at any time within the period of this lease and or any extension of time thereof; provided this lease shall be in force and effect. Said purchase price shall be payable as follows: Ten Thousand Dollars (\$10,000.00) to be paid in cash at the time of notice to the first party of the exercising of said option to purchase, and a like sum of Ten Thousand Dollars (\$10,000.00) to be paid on or before the expiration of each and every period of six (6) calendar months thereafter, until said purchase price of Fifty Thousand Dollars (\$50,000.00) shall be fully paid. It is further agreed that seventy-five per cent (75%) of the royalties and rental payments paid under this lease shall be applied and credited upon the purchase price of the said three-fourth ( $\frac{3}{4}$ ) interest in said property herein provided to be sold in the event the second parties exercise said option and purchase said property hereunder, and shall from time to time be credited upon the installment of purchase price next becoming due and payable after the first installment herein mentioned.” [3]

a copy of which said lease and option is hereto attached and marked “Exhibit A”.

That thereafter, and on or about the 1st day of December, 1934, the said lease and option was as-

signed to the Mount Gaines Mining Company, the above named debtor, and the said Mount Gaines Mining Company thereupon entered into the possession of all of said mining claims under said lease and option, and ever since said time has been, and *no* is, in the sole and exclusive possession of all of said mining claims. That while the said Mount Gaines Mining Company was so in possession of all of said mining claims by virtue of said lease and option, the Superior Court of the State of California, in and for the County of Mariposa, in an action therein pending, entitled:

“J. W. Humphrey, Plaintiff, vs. Mount Gaines Metals, Inc., a corporation, E. W. Grant, A. J. Grant, his wife, A. Hart, May M. Hart, his wife, E. K. Davis, Harry Lee Jones, C. F. Humphrey, First Doe, et al., Defendants”, Case No. 1474, by its Decree duly given and made on February 21, 1936, directed said J. W. Humphrey to convey the legal title to all of said mining claims to the California Pacific Title and Trust Company as Trustee of such legal title, and in trust for W. H. Holcomb, Harry Lee Jones, and C. F. Humphrey, as tenants in common, in the proportions of one-third thereof in each, the said claims being the same mining claims then under lease and option to the Mount Gaines Mining Company. That thereafter the said J. W. Humphrey did so convey the legal title to all of the said mining claims to the California Pacific Title and Trust Company, as trustee.



That on or about the 25th day of May, 1937, the Mount Gaines Mining Company duly and regularly served a written notice upon C. F. Humphrey, W. H. Holcomb, Harry Lee Jones, and the [4] California Pacific Title and Trust Company, trustee, that it exercised the right to purchase the undivided three-fourths interest in said mining claims as set forth in said lease and option, "Exhibit A", and directed the said C. F. Humphrey, Harry Lee Jones, W. H. Holcomb, and California Pacific Title and Trust Company to apply three-fourths of all of the royalty payments theretofore paid by it upon the purchase price of said mining claims. That a copy of said notice is hereunto attached and marked "Exhibit B".

That on the 9th day of June, 1937, the said California Pacific Title and Trust Company, by its notice in writing, refused to comply with the said notice, and refused to apply three-fourths of the said royalties upon the said purchase price, a copy of which said written refusal is hereto attached and marked "Exhibit C".

That at the time said written notice of the exercise of the option was served on C. F. Humphrey, Harry Lee Jones, W. H. Holcomb, and California Pacific Title and Trust Company as trustee, said Mount Gaines Mining Company had paid to J. W. Humphrey and the said California Pacific Title and Trust Company the sum of \$17,418.48 in royalties. That the amount to be applied upon the purchase price on said date was \$13,063.86, of which

\$10,000.00 was to be applied upon the first payment, and the balance applied upon the next payment coming due six months thereafter. That on said 25th day of May, 1937, there was a balance due for the purchase price for said three-fourths interest of \$36,939.14.

That from May 25th, 1937 until August 28th, 1939, the Mount Gaines Mining Company paid the additional sum of \$49,532.89 in royalties to the California Pacific Title and Trust Company, [5] making the total payments of royalties as of said date, August 28th, 1939, the sum of \$66,951.69. That under direction of the notice of May 25th, 1937 to apply three-fourths of all royalties paid in upon the purchase price of an undivided three-fourths interest of the mining claims set out in the lease and option, would have made the amount paid upon the three-fourths interest \$50,213.53, being an overpayment of \$213.53. That since the 28th day of August, 1939, the said Mount Gaines Mining Company became and was the owner of an undivided three-fourths interest in all of the mining claims mentioned in the said lease and option, and that thereafter said California Pacific Title and Trust Company was entitled to receive only twenty-five per cent of the ten per cent mentioned for rents and royalties, to be divided between Humphrey Estates, Inc., Harry Lee Jones, and W. H. Holcomb, or their successors or assigns.

That from August 28th, 1939 to January 12th, 1942, the Mount Gaines Mining Company paid to

the California Pacific Title and Trust Company and the Title Insurance and Guaranty Company the sum of \$46,260.56; that there was only justly and legally due upon the interest then held by the said California Pacific Title and Trust Company and the Title Insurance and Guaranty Company for themselves and the beneficiaries, the sum of \$11,565.14, and that the overpayment amounted to the sum of \$34,795.42, plus the overpayment heretofore mentioned of \$213.53, making the total amount due to the Mount Gaines Mining Company of \$34,908.95. That the sum of \$34,908.95 would make the overpayments to the Humphrey Estates of \$11,636.31, and the interest represented by Harry Lee Jones and assigns the sum of \$11,636.31, and due to the amount returned to the Trustee under and by virtue of the settlement hereinafter mentioned awarding one-half of one-third [6] to the Trustee, would leave the amount of indebtedness of Halverson in the amount of \$2927.02, or a total amount to be returned to this Trustee of \$26,199.64, and that there is now due, owing and unpaid the said sum of \$26,199.64, on account of the overpayments made to the California Pacific Title and Trust Company and the Title Insurance and Guaranty Company for their beneficiaries, and that the same has not been paid nor any part thereof.

That on January 30th, 1939, an action was commenced in the Superior Court of the State of California, in and for the County of Mariposa, by the Mount Gaines Mining Company and the Interna-

tional Mining and Milling Company, debtors herein, against A. G. Ilseng, William H. Holcomb, California Pacific Title & Trust Company, a corporation, First Doe, et al., fictitious defendants, Action No. 1732, seeking a Decree of that Court adjudging the plaintiffs therein to be the owner of an undivided one-third interest in the mining claims leased and optioned to the Mount Gaines Mining Company, and specifically set out in "Exhibit A", and on or about February 25th, 1939, a restraining order and injunction was issued by the said Court directed to the California Pacific Title and Trust Company restraining said California Pacific Title and Trust Company from paying any rents and royalties due or to become due on the one-third interest to William H. Holcomb and the other defendants named in said action, and until the further order of the Court, and that from May 1st, 1939 up until December 1st, 1940, no rents or royalties on the one-third interest were paid, but the same were held in trust by the said California Pacific Title and Trust Company awaiting the final determination of said action.

That while said action was so pending in the said [7] Superior Court of the State of California, in and for the County of Mariposa, and on or about the 12th day of April, 1939, an action was commenced in the United States District Court, for the Southern District of California, Northern Division, by the International Mining and Milling Company, a corporation, and the Mount Gaines Mining Com-

pany, a corporation, plaintiffs, the debtors herein, against A. G. Ilseng, William H. Holcomb, California Pacific Title & Trust Company, a corporation, L. A. McKercher, William Bradish, E. M. Roberts, First Doe, et al., defendants, Action 24 Civil, seeking a Decree of that Court adjudging the plaintiffs therein to be the owner of an undivided one-third interest in the mining claims leased and optioned to the Mount Gaines Mining Company, and specifically set out in "Exhibit A", being the one-third interest mentioned in the Decree of the Superior Court of California in and for the County of Mariposa, No. 1474, held in trust by the California Pacific Title & Trust Company for W. H. Holcomb, and that a restraining order and injunction was issued by said Court restraining the said California Pacific Title and Trust Company from paying any rents and royalties under said lease to the said named defendants, and that said action and said injunction and restraining order remained in full force and effect until November 27th, 1940.

That on May 3rd, 1939, the said action pending in the Superior Court of the State of California, in and for the County of Mariposa, was dismissed by the plaintiffs.

That during said period of time, that is to say, between the 1st day of May, 1939, and November 27th, 1940, while said action was pending in the said United States Court, the sum of \$12,206.58 was impounded and held by the California Pacific Title and Trust Company awaiting the determina-

tion of said action. [8] The remaining two-thirds of the rents and royalties were paid to the Humphrey Estates, Inc., and Harry Lee Jones, and to some of the assigns of the said Harry Lee Jones.

That on the 13th day of November, 1940, this Court, by its order duly given and made, authorized the Trustee to prosecute as Trustee of the above named debtors, and to compromise and settle the action pending in the District Court of the United States for the Southern District of California, Northern Division, the Action No. 24 Civil, pending in said court, and that thereafter, to-wit, on or about the 25th day of November, 1940, the Trustee compromised said named action and entered into an agreement of compromise dated November 25th, 1940, under the terms of which said agreement this Trustee accepted one-half of the one-third interest in said mining claims, and one-half of the moneys impounded, and that on the 27th day of November, 1940, the said United States District Court for the Southern District of California, Northern Division, entered its Judgment and Decree adjudging James P. Hart, the Trustee herein, as Trustee for said Mount Gaines Mining Company, to be the absolute owner of an undivided one-half of the one-third beneficial interest in and to the mining property involved in the said litigation, and that Joseph J. Mueller was decreed to be the absolute owner of an undivided one-fourth of said one-third beneficial interest subject to the lease and option to purchase held by the Mount Gaines Mining Company, and

that Byron Halverson, as successor of William L. Bradish, was decreed to be the owner of an undivided one-fourth of said one-third beneficial interest subject to the lease and option to purchase held by the Mount Gaines Mining Company, and that ever since the said 27th day of November, 1940, the Trustee herein, as Trustee for the Mount Gaines Mining Company, [9] has been the legal owner of one-half of the one-third interest mentioned in said Judgment and Decree, and that said Joseph J. Mueller is the absolute owner of an undivided one-fourth of the one-third interest, subject to the lease and option held by the Mount Gaines Mining Company, and that Byron Halverson, as successor of William L. Bradish, is the absolute owner of an undivided one-fourth of said one-third beneficial interest, subject to the lease and option to purchase held by the Mount Gaines Mining Company. Said Decree further provided that all moneys impounded or held by the California Pacific Title and Trust Company should be divided equally between James P. Hart, as Trustee for the Mount Gaines Mining Company, and Byron Halverson. That under such Decree your Trustee received the sum of \$6103.29, and Byron Halverson received the sum of \$6103.29, on or about the 3rd day of December, 1940.

That on May 1st, 1939, the sum of \$42,977.45 had been paid upon the amount due for the purchase price of the three-fourths interest of the said Mount Gaines Mine, leaving a balance due and unpaid as of that date of \$7022.55. That on the said May 1st,

1939, and thereafter, one-third of all royalties paid were impounded by the said California Pacific Title and Trust Company as hereinbefore set forth. That three-fourths of all royalties so impounded were to be applied upon the purchase price of the three-fourths interest which was held in trust by the California Pacific Title and Trust Company for the defendants named in said Civil Action No. 24, and that the amount that was to be paid for the three-fourths of the said one-third interest was \$2340.85 as of May 1st, 1939. That upon the payment of said sum of \$2340.85, the said Mount Gaines Mining Company became and was the owner of three-fourths of the said one-third interest. [10] That the said one-third interest was further entitled to receive one-twelfth of all royalties paid from May 1, 1939 to December 1, 1940, or a total of \$2750.33, making the total payment due to said one-third interest on December 1, 1940, the sum of \$5091.18. That the said Halverson received the sum of \$6103.29 on December 3, 1940, and said amount was an overpayment of \$1012.11. That from December 3, 1940 to January 12, 1942, said Halverson has received royalties on said one-sixth interest in the sum of \$3829.82, but that he should have received payment on one-twelfth, making an overpayment to him for that period of \$1914.91, or a total overpayment to said Halverson in the sum of \$2927.02.

That since the 28th day of August, 1939, the Trustee has continued to pay ten per cent of the gross receipts for the sale of ores from the mining prop-



erties leased and optioned to it, and that three-fourths of all of said ten per cent payments belongs to the Mount Gaines Mining Company, and that only one-fourth of said payments belongs to the beneficiaries of the California Pacific Title and Trust Company and the Title Insurance and Guaranty Company.

That there is now due and owing to the Mount Gaines Mining Company on account of such overpayments, from the one-third interest herein which was decreed to C. F. Humphrey, or Humphrey Estates, Inc. \$11,636.31, and from the one-third interest decreed to Harry Lee Jones the sum of \$11,636.31, and from the interest now held by Byron Halverson and Joseph J. Mueller, the sum of \$2927.02, and that the same has not been paid nor any part thereof.

That the Mount Gaines Mining Company has been the owner of an undivided three-fourths of all of said mining claims, and has been entitled to receive an undivided three-fourths of all [11] the payments made since August 28th, 1939, except for the payments hereinbefore set forth which have been paid to the petitioner from the interest originally decreed to W. H. Holcomb.

That your petitioner has not full information of all claimants or parties who may have claims as beneficiaries of the two Trustees, and that if there are any such claimants who are not mentioned herein, that they are entitled to be heard herein, and it is the desire of the petitioner to be permitted

to bring in such additional parties as may be interested in the subject matter of this proceeding.

Wherefore, your petitioner prays the judgment and decree of this Court:

1. That the Mount Gaines Mining Company is the owner of an undivided three-fourths of all of the mining claims under the lease and option granted by J. W. Humphrey to Yates and Binns, and assigned to the Mount Gaines Mining Company, as set out in "Exhibit A", and that said Mount Gaines Mining Company was such owner ever since August 28th, 1939.

2. That the Mount Gaines Mining Company is entitled to have returned to it three-fourths of all royalties paid to the California Pacific Title and Trust Company and the Title Insurance and Guaranty Company since August 28th, 1939, except the amounts which have been returned by reason of the settlement had with the representatives and assignees of W. H. Holcomb, said sums to be returned to the Mount Gaines Mining Company being as follows: Humphrey Estates, Inc. \$11,636.31; Harry Lee Jones and his assignees, \$11,636.31; Byron Halverson and Joseph J. Mueller \$2927.02, and that said money be returned and paid to the Mount Gaines Mining Company within a reasonable time to be fixed by the [12] Court, and that said claim for said money be also decreed to be a lien on the one-fourth interest held in trust for said named parties by the California Pacific Title and Trust Company and

the Title Insurance and Guaranty Company. That in the event said money is not paid within the time fixed by this Court, that the said Trustees be directed to sell the said undivided one-fourth interest to the highest and best bidder, and that the said Mount Gaines Mining Company be permitted to be a bidder at such sale; that the said Trustees from the proceeds of said sale pay the said sum of \$26,199.64 to the Mount Gaines Mining Company, and that in the event that the proceeds from said sale are insufficient to pay the amount due the Mount Gaines Mining Company, that this Court direct that a deficiency judgment be docketed against the said named parties in such sum or sums as the Court may direct.

3. That the Court direct the Trustees, California Pacific Title and Trust Company, and Title Insurance and Guaranty Company, to convey the title to an undivided three-fourths of all of the mining claims mentioned in said lease and option to the Mount Gaines Mining Company, and that its title be quieted to such three-fourths interest against all parties making claim or claims for any portion of said undivided three-fourths interest.

4. That your petitioner be directed to continue to pay to the Title Insurance and Guaranty Company the said ten per cent rental and royalties, and that all but one-sixth of said royalties be impounded and held by it as Trustee for the parties to this proceeding, or those legally entitled to the same, until the further order of this Court; that one-sixth

of said royalties so paid be returned to this Trustee on account of the interest heretofore received by the Mount Gaines Mining Company by virtue of the Decree and settlement of November 27th, 1940.

5. That this Court issue its order directed to the [13] said parties named in this petition, and each of them, requiring them and each of them to appear before this Court at a date and at a time to be fixed by this Court, then and there to show cause, if any they have, why the demands and relief prayed for herein should not be granted. That during the pendency of this proceeding, that they and each of them, take no action or proceeding, except with permission of this Court, to interfere with or prevent the operation of the said mining claims by the Trustee appointed by this Court in said proceedings for reorganization, and that said parties be restrained and enjoined from in any manner interfering with the rights of the Mount Gaines Mining Company and your petitioner in the protection and securing the rights of said debtor corporation, Mount Gaines Mining Company.

6. For such other and further orders as may be meet and proper.

Dated at Reno, Nevada this 28th day of February, 1942.

(s) JAMES P. HART

Petitioner.

(s) JAMES T. BOYD

Attorney for Petitioner. [14]

## EXHIBIT A

## AGREEMENT

This Agreement of lease with option to purchase made in triplicate and entered into this 16th day of December 1933 by and between J. W. Humphrey of San Francisco, California, hereinafter called the "Owner", and Carl W. Yates and J. E. Binns, both of Los Angeles, California, hereinafter called the "Lessees":

Whereas, J. W. Humphrey is the Owner of certain mining properties situate in Mariposa County, California, generally known as the Mount Gaines, and being particularly described in Exhibit A, hereto attached and made a part hereof, and hereinafter called "The Mine";

Said Owner hereby states that certain parties assert claims against the title to said mine property, which claims the Owner denies; and said Owner hereby agrees to use his best endeavors to clear the title of said property; but in the event he fails in said efforts to so clear the title of said property, said Owner shall not be liable to the Lessees for damages in any amount.

Now Therefore, the Owner in consideration of the Lessees fulfilling the covenants and agreements herein contained to be by them kept and performed, does by these presents give and grant unto the Lessees a lease for the period of ten years (10 yrs.) from the date hereof upon said Mine and all appurtenances thereto upon the following terms and

conditions with the right and privilege to mine, extract, mill and remove ores, metals and values therefrom;

To Wit: That within thirty days (30 days) after written notice of clearance of said title, Lessees shall enter upon and have possession of said Mine and all appurtenant thereto, and shall within the next calendar month perform or cause to be performed at least fifty (50) shifts of mine work in rehabilitation of said mine, or exploration, exploitation, development and improvement of said mine as shall be such as is necessary in good mining; and in the second calendar month and each following calendar month thereafter shall perform at least ninety (90) shifts per month:

That all operations of said Lessees herein shall be in accordance with the laws and mine and mill regulations of the State of California:

That said Lessees shall carry on all mining and milling operations so that if it is within reason and mining possibilities, such work shall develop as much ore as is now in sight (developed or exposed) in said mine:

That Lessees shall pay as a royalty to the Owner ten per cent (10%) of all production of and from said mine, from the gross returns of ores shipped and sold, the returns from all recovery of ores milled, concentrates, amalgams, mint returns on bullion. Said royalty payments to be considered as a rental only, and all such payments to be made in and through the Security First National Bank of Los Angeles, California. [15]

That all payments shall be made and accompanied by a duplicate copy of such returns, not later than the 25th day of following calendar month; and that upon said 25th day Lessees shall make in writing a full report of all operations, developments, and exposures of moment:

That the Lessees shall pay and discharge when due and when delinquent all taxes hereinafter accruing against the Mine and its improvements and shall do all assessment work as required by law, make the necessary affidavits and record the same at their own expense.

That said Lessees shall use all diligence in the protection and continuity of title of all present existing mining, mineral locations, water and tailing rights and those that may legally accrue under the maintenance and operation of said Mine property at their own expense:

That the Lessees shall post and keep posted legal non-liability notices for said Owner and record a sworn copy of the same in the records of Mariposa County to protect the Owner against any debts for labor, material, or supplies; of debts of said Lessees upon the Mine and that they will hold and save harmless the Owner from any and all loss or damage arising out of any maintenance or operation under this agreement:

That the Lessees further agree that all equipment and improvements shall be then deemed affixed thereto and become a part of said Mine and subject to this lease and option:

That the Lessees shall carry legal compensation insurance on all men by them employed and shall keep complete records of operations, accounts, mining maps and production, which together with all their workings and milling equipment are to be open to full inspection of the Owner at any time:

That should the Lessees fail to keep any of the covenants herein provided, or to carry out any of said covenants contained, then the Owner shall be released therefrom and enter forthwith into possession of said Mine and all property thereon.

It Is Mutually understood and agreed by all the parties hereto, that any failure of the Owner to insist upon a strict compliance of the terms of this agreement by the Lessees shall not constitute or be deemed a waiver of the right of the owner to insist upon such compliance.

It Is Further agreed that any contiguous mining ground that can and may be located and any water or water rights that may be denounced or in any wise acquired for use of operations of said Mine or mill, shall forthwith become the property of said Mine and the Owner thereof and included in this lease and option.

It is further covenanted and agreed that all the herein terms under this agreement are subject to fire, flood, strikes and acts of God.

In consideration of, and the faithful compliance thereto by said Lessees of the foregoing agreement and covenants therein, the said Owner agrees that upon written application of the Lessees to grant



unto said Lessees a further lease upon said Mine, its improvements and acquisitions, an extension of this lease for a further term of ten years under the same covenants, royalties and rights. [16]

Said owner, for and by the considerations and agreements herein therefore grants unto the Lessees an option to purchase an undivided three-fourths ( $\frac{3}{4}$ ) interest in said mine, property and all appurtenances thereof or the sum of Fifty Thousand Dollars (\$50,000.00) at any time within the period of this lease and or any extension of time thereof; provided this lease shall be in force and effect. Said purchase price shall be payable as follows: Ten Thousand Dollars (\$10,000.00) to be paid in cash at the time of notice to the first party of the exercising of said option to purchase, and a like sum of Ten Thousand Dollars (\$10,000.00) to be paid on or before the expiration of each and every period of six (6) calendar months thereafter, until said purchase price of Fifty Thousand Dollars (\$50,000.00) shall be fully paid. It is further agreed that seventy-five per cent (75%) of the royalties and rental payments paid under this lease shall be applied and credited upon the purchase price of the said three-fourth ( $\frac{3}{4}$ ) interest in said property herein provided to be sold in event the second parties exercise said option and purchase said property hereunder, and shall from time to time be credited upon the installment of purchase price next becoming due and payable after the first installment herein mentioned.

It is agreed that in the event the Lessees exercising the before mentioned option to purchase, the payment shall be made in the Bank before mentioned herein and that the Owner shall upon notice of such tender of payment deposit in said Bank a good and sufficient deed of conveyance to the Optionees for the three-fourth ( $\frac{3}{4}$ ) interest.

It is mutually understood and agreed by all the parties hereto that both the Owner and Optionee-Lessee shall have the right to assign any or all of their or his rights under this agreement, and that each and all conditions and rights set forth herein shall inure to the benefit of and be binding upon the assigns, heirs and executors of the parties hereto.

Within three months after work is commenced hereunder, the Lessees shall insure buildings and machinery on property in the sum of Five Thousand (\$5000.00). Loss, if any, payable to Owner.

Time is the essence of this agreement.

In Witness whereof, the parties hereunto have affixed their signatures on the day and year first above written.

J. W. HUMPHREY

Owner

CARL W. YATES

J. E. BINNS

Lessees-Optionees [17]

“Exhibit A” of Agreement

This Exhibit excluded as per Section 1 of Praeceptum for Transcript of Record. [18]

EXHIBIT B

NOTICE

To C. F. Humphrey, W. H. Holcomb, Harry Lee Jones, and California Pacific Title & Trust Company, Trustee:

Please take notice that the undersigned, Mount Gaines Mining Company, a Corporation, lessee and optionee under that certain agreement of lease with option to purchase, made the 16th day of December, 1933, between J. W. Humphrey, therein called the "owner", and Carl W. Yates and J. E. Binns, therein called the "lessees", all of the rights, title and interest of the lessees therein named having heretofore been assigned to the undersigned Corporation, hereby elects to exercise, and does exercise, the option to purchase mentioned in said above named agreement; further, that the undersigned Corporation has paid to you, the present owners, lessors and optionors of the property described in said above mentioned agreement, and or your predecessors in interest, as royalties falling due thereunder, the full sum of \$13,333.34, three-fourths of which sum may, at the election of the undersigned, be applied toward and upon the purchase price of said property, and that the undersigned does elect that three-fourths of the amount of said royalties, to-wit, the sum of \$10,000, do apply upon said purchase price and do constitute the \$10,000 cash payment required, pursuant to the

terms of the above mentioned agreement, to be paid upon the giving of this notice.

Dated: May 25, 1937.

[Corporate Seal]

MOUNT GAINES MINING  
COMPANY

By A. G. ILENG  
President

By V. A. HARRIS  
Secretary [19]

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EXHIBIT C

Letterhead of

CALIFORNIA PACIFIC TITLE & TRUST  
COMPANY

148 Montgomery Street  
Telephone Sutter 3500  
San Francisco

June 9, 1937

Mount Gaines Mining Company,  
183 North Martel Avenue,  
Hollywood, California.

In Re: Trust No. 1725

Gentlemen:

Referring to your communication dated May 25th, 1937, apparently deposited in the United States Mails May 27th, and purporting to be a no-

tice that you exercise the option to purchase a three-quarters interest in property in Mariposa County, California, known as Mount Gaines Mine, as provided in a certain agreement of lease made December 16th, 1933, between J. W. Humphrey, as Owner, and Carl W. Yates and J. E. Binns, as Lessees, please be advised that, under that certain action numbered 1474 in the Superior Court of the County of Mariposa, wherein J. W. Humphrey was plaintiff and Mt. Gaines Metals, Inc., et al, were defendants, the undersigned was appointed Trustee to hold in trust the property referred to in your notice. Under the provisions of such judgment, the action of the undersigned as such Trustee is to be determined by the united instructions of all the Beneficiaries named therein. The undersigned has not, up to date, received the instructions from all of said Beneficiaries, but in the absence thereof and in order that the failure of the undersigned to reply to your purported election to exercise the option which you claim to have, may not be construed as in any way affecting any of the Beneficiaries of this Trust, or their rights therein, you are advised that the undersigned cannot accept your purported election to exercise your claimed option.

Furthermore, it is claimed by some of the Beneficiaries above referred to that your right to exercise said option has been heretofore lost by your failure to comply with the terms and provisions of said Lease, due notice of which non-compliance has heretofore been given you.

Also, without in any manner waiving the termination of your right to exercise said option, that said purported notice is of no force or effect and does not constitute an election to exercise said purported option for the reason that the sum of Ten Thousand and No/100 (10,000.00) Dollars in cash did not accompany your said notice, the payment thereof as part of the purchase price being specifically provided for under the terms of said Lease.

For the reasons above given, your purported notice to exercise the alleged option is of no force or effect, nor is it binding upon us, nor does said right to exercise said option any longer exist.

Very truly yours,

CALIFORNIA PACIFIC TITLE  
& TRUST COMPANY

By (Sgnd.) HARRY GEBALLE

Its Assistant Trust Officer

HG:AG

Registered Mail

Ret. Rec. Req.

[Endorsed]: Filed March 2, 1942. [20]

[Title of District Court and Causes.]

MOTION OF RESPONDENT TITLE INSURANCE AND GUARANTY COMPANY TO DISMISS PROCEEDING AND TO QUASH SERVICE OF PROCESS.

Now comes Title Insurance and Guaranty Company, a corporation, as trustee under the trust referred to in the petition hereinafter mentioned, and, appearing herein specially for the sole purpose of these motions, moves the Honorable above entitled court as follows:

1. To vacate the order of said court made on the 2nd day of March, 1942, in so far as it directs service of a copy of said order and of the petition referred to therein upon this respondent, on the ground that said respondent is a corporation, organized under the laws of the State of California, [24] and was not and is not subject to service of process within the District of Nevada, and on the ground that said respondent has not been served with process in the District of Nevada, all of which appears in the affidavit of Walter C. Clark hereto annexed, marked "Exhibit A", and made a part hereof.

2. To dismiss the petition dated February 28th, 1942, filed in the above entitled proceedings by James P. Hart, petitioner, on March 2nd, 1942, and the proceedings based thereon as to this respondent on the ground that certain court has no jurisdiction in this proceeding to entertain said petition as to

said respondent nor in this proceeding to grant any of the relief prayed for in said petition as against said respondent, and on the ground that said petition fails to state a claim upon which relief can be granted against said respondent in this proceeding, as more clearly appears from the allegations of said petition, the aforesaid affidavit of Walter C. Clark, and the affidavit of A. V. Salerno hereto annexed, marked "Exhibit B" and made a part hereof.

3. To dismiss said petition and the proceedings based thereon on the ground that said petition fails to state a claim upon which any relief can be granted against this respondent.

EDWARD D. LANDELS  
LANDELS, WEIGEL  
AND CROCKER  
STONEY, ROULEAU,  
STONEY & PALMER

Attorneys for Respondent

Title Insurance and

Guaranty Company

130 Montgomery Street,

San Francisco, California

[25]

To James T. Boyd

Attorneys for Petitioner,

Suite 217 E. D. Lyon Bldg.,

Reno, Nevada.

Please take notice that the undersigned will bring the foregoing motion on for hearing before the above



entitled court in Carson City, Ormsby County, State of Nevada, on the 6th day of April, 1942, at 10:00 o'clock A. M. of said day, or as soon thereafter as counsel can be heard.

EDWARD D. LANDELS  
LANDELS, WEIGEL  
& CROCKER

STONEY, ROULEAU,  
STONEY & PALMER

Attorneys for Respondent  
Title Insurance and Guar-  
anty Company,  
130 Montgomery Street,  
San Francisco, California

Service of a copy of the within motion and of the affidavits therein referred to is hereby admitted this      day of April, 1942.

JAMES T. BOYD

Attorney for Petitioner  
James P. Hart. [26]

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EXHIBIT "A"

[Title of District Court and Causes.]

AFFIDAVIT OF WALTER C. CLARK

State of California,  
City and County of San Francisco—ss.

Walter C. Clark, being first duly sworn, deposes and says:

That he is and for many years has been an officer, to-wit, a Vice-President of Title Insurance and Guaranty Company, a corporation;

That said Title Insurance and Guaranty Company was organized as a corporation under the laws of the State of California and ever since the date of its incorporation has been and it now is a corporation organized under the laws of said State of California, and that ever since its incorporation [27] has been and it now is a citizen and resident of said State of California and a non-resident of the State of Nevada;

That said Title Insurance and Guaranty Company has never transacted any business in the said State of Nevada, has never maintained an office in the said State of Nevada and has never maintained or had an agent in the said State of Nevada for the transaction of business;

That on the 6th day of March, 1942, there was delivered to this affiant in the City and County of San Francisco, State of California, a document purporting to be a copy of a petition dated February 28, 1942, by one James P. Hart, as petitioner, filed in the above entitled matter on March 2, 1942, and a document purporting to be a copy of an Order to Show Cause and Temporary Restraining Order issued by the above entitled court on March 2, 1942, directed to said Title Insurance and Guaranty Company and others; that neither the original nor any copy of said petition or of said order to show cause nor any process issuing out of the above entitled court has been served upon affiant nor upon

any other officer or agent of said Title Insurance and Guaranty Company within the said State of Nevada.

That said Title Insurance and Guaranty Company has not consented and does not now consent to the jurisdiction of the above entitled court in the above entitled proceeding to hear or to determine the issues raised in said petition or to grant the relief therein prayed for against said Title Insurance and Guaranty Company or to exercise any jurisdiction of said company in this proceeding.

WALTER C. CLARK

Subscribed and sworn to before me this 2nd day of April, 1942.

[Seal]

EMI EGGERS DEL BONO

Notary Public in and for the  
City and County of San  
Francisco, State of Cali-  
fornia.

My Commission expires December 14, 1942. [28]

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EXHIBIT "B"

[Title of District Court and Causes.]

AFFIDAVIT OF A. V. SALERNO

State of California,  
City and County of San Francisco—ss.

A. V. Salerno, being first duty sworn, deposes and says:

That prior to the 3rd day of September, 1940, affiant was, ever since has been, and now is Assistant Trust Officer of Title Insurance and Guaranty Company, a corporation, and as such, during all of said time, has had the management of all of those trusts under which said corporation has acted as trustee. [29]

That on February 21st, 1936, the Superior Court of the State of California, in and for the County of Mariposa, in an action entitled "J. W. Humphrey, Plaintiff, vs. Mount Gaines Metals, Inc., a corporation, E. W. Grant, A. J. Grant, his wife, A. Hart, May M. Hart, his wife, E. K. Davis, Harry Lee Jones, C. F. Humphrey, Defendants, No. 1474", made its decree by which J. W. Humphrey was directed to convey the legal title to the mining claims described in a certain lease between J. W. Humphrey as "owner" and Carl W. Yates and J. E. Binns, as "lessees", dated December 16th, 1933, a copy of which is marked Exhibit "A" and is attached to the petition of James P. Hart, dated February 28, 1942, on file in the above entitled matter, to California Pacific Title & Trust Company as trustee for W. H. Holcomb, Harry Lee Jones and C. F. Humphrey.

That thereafter J. W. Humphrey did convey said mining claims to said California Pacific Title & Trust Company as directed by said decree:

That from February 21st, 1936, to September 3rd, 1940, said California Pacific Title & Trust

Company held the title to said mining claims as trustee for J. W. Humphrey, W. H. Holcomb, Harry Lee Jones or their assignees;

That on September 3rd, 1940, said California Pacific Title & Trust Company resigned as trustee under the trust created by said decree of the Superior Court of the State of California, in and for the County of Mariposa, and that on said day its resignation was accepted by said Superior Court and said Title Insurance and Guaranty Company by order of said court dated September 3rd, 1940, was appointed as trustee under the aforesaid trust in the place and stead of said California Pacific Title & Trust Company. [30]

That thereafter and on September 6th, 1940, said California Pacific Title & Trust Company, pursuant to said last mentioned decree, conveyed said mining claims to Title Insurance and Guaranty Company by a deed which was recorded in the office of the County Recorder of Mariposa County, California, in Volume 8 of Official Records, at page 181;

That ever since the said 3rd day of September, 1940, said Title Insurance and Guaranty Company has been and it now is the duly appointed, qualified and acting trustee under the trust created by the final judgment made and entered on or about February 21st, 1936, in the aforesaid action of J. W.

Humphrey, plaintiff, vs. Mount Gaines Metals, Inc., et al, defendants.

A. V. SALERNO

Subscribed and sworn to before me this 2nd day of April, 1942.

[Seal]

EMI EGGERS DEL BONO

Notary Public in and for the  
City and County of San  
Francisco, State of Cali-  
fornia.

My Commission Expires December 14, 1942.

[Endorsed]: Filed April 4, 1942. [31]

[Title of District Court and Causes.]

MOTION OF RESPONDENT TO DISMISS  
PROCEEDING AND TO QUASH SERV-  
ICE OF PROCESS.

Now comes California Pacific Title & Trust Company, and appearing solely for the purpose of these motions, moves the court as follows:

1. To vacate the order of this court made on March 2, 1942, in so far as it directs service of a copy thereof and of the petition referred to therein upon this respondent and to quash the service thereof upon this respondent on the ground that this respondent is a corporation, organized under the laws of California, and was not and is not subject to service of process [32] within the District of Nevada, and on the ground that this respondent has not been properly served with process in this action nor been served with process in the District of Nevada, all of which more clearly appears in the affidavits of Wm. H. Smith, Jr. and Harry Geballe hereto annexed as Exhibit "A" and Exhibit "B", respectively.

2. To dismiss the petition dated February 28, 1942, filed in the above proceedings by James P. Hart, Petitioner, on March 2, 1942, and the proceedings based thereon as to this respondent on the ground this court has no jurisdiction in this proceedings to entertain said petition as to this respondent nor in this proceeding to grant any of the

relief prayed for in said petition as against this respondent, and on the ground that said petition fails to state a claim upon which relief can be granted against this respondent in this proceeding, as more clearly appears from the allegations of said petition and the affidavits of Wm. H. Smith, Jr. and Harry Geballe hereto annexed as Exhibits "A" and "B" respectively.

3. To dismiss said petition and the proceedings based thereon on the ground that said petition fails to state a claim upon which any relief can be granted against this respondent.

EDWARD D. LANDELS

LANDELS, WEIGEL

& CROCKER

STONEY, ROULEAU,

STONEY & PALMER

Attorneys for Respondent

California Pacific Title &

Trust Company

275 Bush Street,

San Francisco, California

To James T. Boyd

Attorneys for Petitioner

Suite 217 E. D. Lyon Bldg.

Reno, Nevada.

Please take notice that the undersigned will bring the above motion on for hearing before this Court in Carson City, Ormsby County, State of Nevada, on the 6th day of April, [33] 1942, at 10 o'clock



A. M., or as soon thereafter as counsel can be heard.

EDWARD D. LANDELS  
LANDELS, WEIGEL  
& CROCKER  
STONEY, ROULEAU,  
STONEY & PALMER

Attorneys for Respondent  
California Pacific Title &  
Trust Company  
275 Bush Street,  
San Francisco, California

Service of a copy of the within motion and of the affidavits therein referred to admitted this 4th day of April, 1942.

JAMES T. BOYD  
Attorney for Petitioner  
James P. Hart [34]

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EXHIBIT "A"

[Title of District Court and Causes.]

AFFIDAVIT OF WM. H. SMITH, JR.

State of California,  
City and County of San Francisco—ss.

Wm. H. Smith, Jr., being first duly sworn, deposes and says:

That he is, and for many years has been, Secretary of the California Pacific Title & Trust Company, a corporation;

That California Pacific Title & Trust Company was organized as a corporation under the laws of California and ever since the date of its incorporation was and now is a corporation organized under the laws of California and that ever since its [35] incorporation was and is now a citizen and resident of California and a non-resident of Nevada;

That California Pacific Title & Trust Company has never transacted any business in the State of Nevada, has never maintained an office in the State of Nevada and has never maintained or had an agent in the State of Nevada for the transaction of business;

That there was delivered to this affiant on March 6, 1942, in the City of San Francisco, State of California, a document purporting to be a copy of a petition dated February 28, 1942, by one James P. Hart, as petitioner, filed in the above entitled matter on March 2, 1942, and a document purporting to be a copy of an Order to Show Cause and Temporary Restraining Order issued by the above entitled court on March 2, 1942, directed to California Pacific Title & Trust Company and others; that neither the original nor any copy of said petition or of said order to show cause nor any process issuing out of the above entitled court has been served upon affiant nor upon any other officer or

agent of California Pacific Title & Trust Company within the State of Nevada;

That California Pacific Title & Trust Company has not and does not now consent to the jurisdiction of the above entitled court in the above entitled proceeding to hear or to determine the issues raised in said petition or to grant the relief therein prayed for against California Pacific Title & Trust Company or to exercise any jurisdiction of said company in this proceeding.

Dated: April 1, 1942.

(illegible presumed to be) WM. H. SMITH

Subscribed and sworn to before me this 1st day of April, 1942.

[Seal] DOROTHY H. McLENNAN

Notary Public in and for the City and County of San Francisco, State of California. [36]

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EXHIBIT "B"

[Title of District Court and Causes.]

AFFIDAVIT OF HARRY GEBALLE

State of California,  
City and County of San Francisco—ss.

Harry Geballe, being first duly sworn, deposes and says:

That from before February 21, 1936, to and until

after September 6, 1940, he was assistant Trust Officer of California Pacific Title & Trust Company, and as such, during all of said time, had the management of those trusts under which said company acted as trustee;

That on February 21, 1936, the Superior Court of the State of California, in and for the County of Mariposa, in an [37] action entitled J. W. Humphrey, Plaintiff, vs. Mount Gaines Metals, Inc., a corporation, E. W. Grant, A. J. Grant, his wife, A. Hart, May M. Hart, his wife, E. K. Davis, Harry Lee Jones, C. F. Humphrey, Defendants, made its decree by which J. W. Humphrey was directed to convey the legal title to the mining claims described in a certain lease between J. W. Humphrey as "owner" and Carl W. Yates and J. E. Binns, as "lessees", dated December 16, 1933, a copy of which is marked Exhibit "A" and is attached to the petition of James P. Hart, dated February 28, 1942, on file in the above entitled matter, to California Pacific Title & Trust Company as trustee for W. H. Holcomb, Harry Lee Jones and C. F. Humphrey.

That thereafter J. W. Humphrey did convey said mining claims to California Pacific Title & Trust Company as directed by said decree;

That from February 21, 1936, to September 3, 1940, California Pacific Title & Trust Company held the title to said mining claims as trustee for J. W. Humphrey, W. H. Holcomb, Harry Lee Jones or their assignees;

That on September 3, 1940, California Pacific Title & Trust Company resigned as trustee under the trust created by said decree of the Superior Court of the State of California in and for the County of Mariposa, and that on said day its resignation was accepted by said Superior Court and Title Insurance and Guaranty Company was by said Court appointed trustee thereof in its stead by a decree made by said Court in the aforementioned action on September 3, 1940;

That thereafter and on September 6, 1940, California Pacific Title & Trust Company, pursuant to said decree, conveyed said mining claims to Title Insurance and Guaranty Company by a deed which was recorded in Vol. 8 of Official Records, page 181, of Mariposa County, California; [38]

That since said 6th day of September, 1940, California Pacific Title & Trust Company has had no interest or title in said mining claims whether as trustee or otherwise and does not now have or claim to have any title or right of possession thereto.

Dated: April 1, 1942.

HARRY GEBALLE

Subscribed and sworn to before me this 1st day of April, 1942.

[Seal]

DOROTHY H. McLENNAN

Notary Public in and for the City and County of  
San Francisco, State of California.

[Endorsed]: Filed April 4, 1942. [39]

[Title of District Court and Causes.]

### PROPOSED AMENDMENT

Now Comes the Trustee and in compliance with the order of the Court heretofore made permitting him to propose amendments to the Petition for Order to Show Cause respectfully submits the following amendment to be inserted on Page 3, following the words, "as trustee" appearing on Line 27, page 3, and preceeding the words "that on or about" appearing on Line 28, Page 3:

"That your petitioner is informed and believes and on such information and belief alleges; that subsequent to the entry of the decree in case 1474, and prior to the filing of this petition, the beneficiaries of the said Trust assigned their interest or parts of their interest to various parties [76] and your petitioner is informed and believes that C. F. Humphrey has assigned all of his interest in said Trust to the Humphrey Estates, Inc.; that Harry Lee Jones assigned an interest in his  $\frac{1}{3}$  to Arthur J. Edwards, D. R. Gustaveson, James S. Hazen and Persis E. Hazen; that W. H. Holcomb assigned various interests in his  $\frac{1}{3}$  but that such  $\frac{1}{3}$  interest is now owned by Byron Halverson and Joseph J. Mueller  $\frac{1}{2}$  of the said  $\frac{1}{3}$  or  $\frac{1}{6}$  of the whole and your Trustee is the owner of  $\frac{1}{2}$  of the said  $\frac{1}{3}$  or  $\frac{1}{6}$  of the whole.

That the said above named parties claim an estate or interest in said  $\frac{3}{4}$  interest adverse to this

petitioner but all such claim or right is subject to the claims and rights of this petitioner to the said 3/4 interest and that the said named parties have not any estate, right, title, or interest whatever in said 3/4 interest or any part thereof.”

JAMES T. BOYD

Attorney for Trustee

July 2, 1942—Ordered proposed amendment granted.

O. E. B.

Clerk.

[Endorsed]: Filed June 4, 1942. [77]

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In the District Court of the United States  
in and for the District of Nevada

MINUTES OF COURT

Friday, September 25, 1942

[Title of Causes.]

The petition of J. P. Hart, Trustee, for order to show cause, filed herein March 2nd, 1942, and directed to the California Pacific Title and Trust Company, et al, answers to order to show cause and special appearances and motions to dismiss of respondents, based on jurisdictional and other grounds, having heretofore been heard, submitted on briefs and by the Court taken under advisement, It Is Ordered that the motions to dismiss are granted without prejudice. The Court now files written opinion. [80]

In the District Court of the United States of  
America, in and for the District of Nevada

No. A-34-A

In the Matter of

INTERNATIONAL MINING & MILLING  
COMPANY, a corporation,

Debtor.

No. A-35-A

In the Matter of

MOUNT GAINES MINING COMPANY, a  
corporation,

Debtor.

In Proceedings for Reorganization of a Corporation

OPINION AND DECISION ON MOTIONS TO  
DISMISS PETITION OF TRUSTEE RE  
MINE OWNERSHIP.

Norcross, District Judge.

The Trustees of above named Debtors filed a Petition for an Order to show cause why the Mount Gaines Mining Company, Debtor, should not be granted "the judgment and decree of this Court:" that said Debtor "is the owner of an undivided three-fourths of all of the mining claims" under a certain lease and option, set out as "Exhibit A" to said Petition, and "was such owner ever since August 28, 1939," and for other incidental matters.



A number of special appearances have been entered and motions to dismiss interposed, based on jurisdictional and other grounds.

The basic question of law upon the hearing of the motions to dismiss presents, primarily, the construction to be placed upon the said lease and option. The following excerpts [81] therefrom will sufficiently present the question:

“This Agreement of lease with option to purchase \* \* \* entered into this 16th day of December, 1933 by and between \* \* \* :

\* \* \*

“Now Therefore, the Owner in consideration of the Lessees fulfilling the covenants and agreements herein contained to be by them kept and performed, does by these presents give and grant unto the Lessees a lease for the period of ten years (10 yrs.) from the date hereof upon said Mine and all appurtenances thereto upon the following terms and conditions with the right and privilege to mine, extract, mill and remove ores, metals and values therefrom:

\* \* \*

“That said Lessees shall carry on all mining and milling operations so that if it is within reason and *ming* possibilities, such work shall develop as much ore as is now in sight (developed or exposed) in said mine:

“That Lessees shall pay as a royalty to the

Owner ten per cent (10%) of all production of and from said mine, from the gross returns of ores shipped and sold, the returns from all recovery of ores milled, concentrates, amalgams, mint returns on bullion. Said royalty payments to be considered as a rental only, and all such payments to be made in and through the Security First National Bank of Los Angeles, California.

“That all payments shall be made and accompanied by a duplicate copy of such returns, not later than the 25th day of following calendar month; and that upon said 25th day Lessees shall make in writing a full report of all operations, developments, and exposures of moment:

\* \* \*

“Inconsideration of, and the faithful compliance thereto by said Lessees of the foregoing agreement and covenants therein, the said Owner agrees that upon written application of the Lessees to grant unto said Lessees a further lease upon said Mine, its improvements and acquisitions, an extension of this lease for a further term of ten years under the same covenants, royalties and rights.

“Said Owner, for and by the considerations and agreements herein therefore grants unto the Lessees an option to purchase an undivided three-fourth ( $\frac{3}{4}$ ) interest in said mine, property and all appurtenances thereto for the

sum of Fifty Thousand Dollars (\$50,000.00) at any time within the period of this lease and or any extension of time thereof; provided this lease shall be in force and effect. Said purchase price shall be payable as follows: Ten Thousand Dollars (\$10,000.00) to be paid in cash at the time of notice [82] to the first party of the exercising of said option to purchase, and a like sum of Ten Thousand Dollars (\$10,000.00) to be paid on or before the expiration of each and every period of six (6) calendar months thereafter, until said purchase price of Fifty Thousand Dollars (\$50,000.00) shall be fully paid. It is further agreed that seventy-five per cent (75%) of the royalties and rental payments paid under this lease shall be applied and credited upon the purchase price of the said three-fourth ( $\frac{3}{4}$ ) interest in said property herein provided to be sold in event the second parties exercise said option and purchase said property hereunder, and shall from time to time be credited upon the installment of purchase price next becoming due and payable after the first installment herein mentioned.

“It is agreed that in the event the Lessees exercising the before mentioned option to purchase, the payment shall be made in the Bank before mentioned herein and that the Owner shall upon notice of such tender of payment deposit in said Bank a good and sufficient deed

of conveyance to the Optionees for the three-fourth ( $\frac{3}{4}$ ) interest."

Exhibit "B" of the Petition is a copy of the notice, claiming election to exercise the option to purchase. The material portion thereof reads:

"To C. F. Humphrey, \* \* \* , and California Pacific Title & Trust Company, Trustee:

"Please take notice that the undersigned, \* \* \* , lessee and optionee under that certain agreement of lease with option to purchase, made the 16th day of December, 1933, \* \* \* all the rights, title and interest of the lessees therein named having heretofore been assigned to the undersigned Corporation, hereby elects to exercise, and does exercise, the option to purchase mentioned in said above named agreement; further, that the undersigned Corporation has paid to you, the present owners, lessors and optionors of the property \* \* \* and or your predecessors in interest, as royalties falling due thereunder, the full sum of \$13,333.34, three-fourths of which sum may, at the election of the undersigned, be applied toward and upon the purchase price of said property, and that the undersigned does elect that three-fourths of the amount of said royalties, to-wit, the sum of \$10,000, do apply upon said purchase price and do constitute the \$10,000, cash payment required, pursuant to the terms of

the above mentioned agreement, to be paid upon the giving of this notice.

“Dated: May 25, 1937.

[Seal]

MOUNT GAINES

MINING COMPANY

By A. G. ILSING,

President.” [83]

Exhibit “C” of the Petition, is a copy of the reply of said named Trustee, of date June 9, 1937, to the above claim (Exhibit B) of exercise of option to purchase. The said reply contains the following statement:

“Also, \* \* \* that said purported notice is of no force or effect and does not constitute an election to exercise said purported option for the reason that the sum of Ten Thousand and No/100 (10,000.00) Dollars in cash did not accompany your said notice, the payment thereof as part of the purchase price being specifically provided for under the terms of said lease.  
\* \* \* .”

It is clear from a reading of the “agreement of lease with option to purchase” that, if such option is not exercised or until it is exercised to the extent of first payment, the legal relationship of the parties continues only as that of lessor and lessee. Until there is “notice” of exercise of the “option to purchase,” accompanied with “cash” payment, of first installment, it is specifically provided that

the "royalty" payments of "ten per cent (10%) of all production" are "to be considered as rental only." If the option is in part exercised, by the payment of one or more of the installment payments, "as in the agreement of lease with option" provided, then, until final payment is made, "seventy-five per cent (75%) of the royalties and rental payments \* \* \* shall be applied and credited upon the purchase price \* \* \* and shall from time to time be credited upon the installment of purchase price next becoming due and payable after the first installment herein mentioned." The above quoted expression, "royalties and rental payments," clearly refer to the preceding expression — "Lessees shall pay as a royalty to the Owner ten per cent (10%) of all production \* \* \* . Said royalty payments to be considered as rental only, \* \* \* . " After the first installment is "paid in cash," then 75% of the amount of said "royalty payments" are to be credited upon the ensuing purchase price installment payments as they [84] fall due, and not "as rental only."

The express language of the lease and option agreement leaves no basis for an interpretation that the said payments, made prior to election to exercise the option, specifically declared "to be considered as rental only" may, by such mere declaration of exercise of option, be so changed in character that three-fourths of the amount thereof, theretofore paid, ceases to be "rental only," as expressly

designated in the agreement, but the property of the lessee and optionee and applicable, if sufficient in amount, to payment not only of the first installment but that of any or all the others.

The said Debtor, not having tendered a cash payment of the full amount of the first installment of the total option purchase price, at the time of giving written notice of the claimed exercise of such option, such option has not as yet been complied with and the Trustee is not entitled to the relief prayed for in his petition. *James on Option Contracts* Secs. -813-817; 35 C. J. 1038-1042, secs. 181-187.

The motions to dismiss are granted without prejudice.

Dated this 25th day of September, 1942.

/s/ FRANK H. NORCROSS

District Judge.

[Endorsed]: Filed September 25, 1942. [85]

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[Title of District Court and Causes.]

### NOTICE OF APPEAL

To: California Pacific Title and Trust Company, a corporation, and its attorneys, Landels, Weigel, and Crocker, and Stoney, Rouleau, Stoney and Palmer; Title Insurance and Guaranty Company, a corporation, and its attorneys, Lan-

dels, Weigel, and Crocker, and Stoney, Rouleau, Stoney and Palmer; Humphrey Estates, Inc., a corporation, and its attorneys, Sterling Carr and Francis P. Walsh; Harry Lee Jones and his attorneys, Sterling Carr and Francis P. Walsh; Arthur J. Edwards and his attorneys, Sterling Carr and Francis P. Walsh; D. R. Gustaveson; James S. Hazen and Persis E. Hazen and their attorneys, Sterling Carr and Francis P. Walsh; Byron Halverson and Joseph J. Mueller and their attorneys, Halverson and Halverson;

Please Take Notice that James P. Hart, the duly appointed Trustee of the above named debtors in proceedings for reorganization, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the whole of that certain Order made and entered in this action on the 25th day of September, [86] 1942, dismissing Trustee's petition for order to show cause and denying said petition.

Dated this 20th day of October, 1942.

**JAMES T. BOYD**

Attorney for Petitioner

**James P. Hart.**

**[Endorsed]: Filed Oct. 20, 1942. [87]**



[Title of District Court and Causes.]

CERTIFICATE OF CLERK, U. S. DISTRICT  
COURT

United States of America,  
District of Nevada—ss.

I, O. E. Benham, Clerk of the District Court of the United States for the District of the Nevada, do hereby certify that I am custodian of the records, papers and files of the said United States District Court for the District of Nevada, including the records, papers and files in the Matters of International Mining and Milling Company, and Mount Gaines Mining Company, Debtors, said matters being Nos. A-34-A and A-35-A, respectively, on the bankruptcy docket of said Court.

I further certify that this transcript, consisting of 96 typewritten pages and numbered from 1 to 96, inclusive, contains a full, true and correct transcript of the proceedings in said matters and of all papers filed therein, as set forth in the Praecipe for Transcript of Record filed herein by James T. Boyd, Esq., attorney for the appellant, and the praecipes for additional portions of the record filed herein by Messrs. Sterling Carr and Francis P. Walsh, and by Messrs. Landels, Weigel & Crocker, and Messrs. Stoney, Rouleau, Stoney & Palmer, attorneys for certain respondents and [95] appellees, all of which praecipes are made a part of the transcript attached hereto, as the same appear from the originals of record and on file in my office as such

Clerk in Carson City, State and District aforesaid.

And I further certify that the cost of preparing and certifying to said record, amounting to \$27.15, has been paid to me by J. P. Hart, Trustee of the above-named Debtors, and appellant herein.

Witness my hand and the seal of said United States District Court this 21st day of December, 1942.

[Seal]

O. E. BENHAM

Clerk, U. S. District Court.

[96]

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[Endorsed]: No. 10333. United States Circuit Court of Appeals for the Ninth Circuit. James P. Hart, Trustee of International Mining & Milling Company, a corporation, Debtor and Mount Gaines Mining Company, a corporation, debtor. Appellant, vs. California Pacific Title and Trust Company, a corporation, Title Insurance and Guaranty Company, a corporation, Humphrey Estates, Inc., a corporation, Harry Lee Jones, Arthur J. Edwards, D. R. Gustaveson, James S. Hazen, Persis E. Hazen, Byron Halverson and Joseph J. Mueller, Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Nevada.

Filed December 23, 1942.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals  
for the Ninth Circuit

No. 10333

In the Matter of

JAMES P. HART as Trustee for International  
Mining & Milling Company, a corporation, and  
Mount Gaines Mining Company, a corporation,  
in reorganization,

Appellants,

vs.

CALIFORNIA PACIFIC TITLE AND TRUST  
COMPANY, TITLE INSURANCE AND  
GUARANTY COMPANY, et als,

Respondents.

STATEMENT OF POINTS ON WHICH AP-  
PELLANTS INTEND TO RELY ON AP-  
PEAL AND DESIGNATION OF THE  
PARTS OF THE RECORD NECESSARY  
FOR THE CONSIDERATION THEREOF.

In compliance with Rule 19 of the above entitled Court, Appellants here state that the points on which they intend to rely on the appeal in the above entitled matter are as follows:

That the question presented was one purely of law by reason of a motion filed and made by the respondent, California Pacific Title & Trust Company, "To dismiss said petition and the proceedings based thereon on the ground that said petition

fails to state a claim upon which any relief can be granted against this respondent." Paragraph 3 of Motion.

The Title Insurance and Guaranty Company and the other respondents made similar motions and joined with the California Pacific Title & Trust Company in presenting said motions.

Appellant relies upon the following points on this appeal and the following designation of the records which he thinks necessary for the consideration thereof.

1. That it affirmatively appears from the petition and the Lease and Option attached thereto that the Mount Gaines Mining Company has, ever since the first day of December, 1934, been, and is now, the owner of the Lease and Option and in the possession of all the mining claims mentioned in said Lease and option.

2. That it is provided in said Lease and Option that the lessee, Mount Gaines Mining Company, while so in possession of said Lease and Option and during the life of said Lease and Option had the right to purchase three-fourths interest in all of said mining claims mentioned in said Lease and Option for the sum of \$50,000.00 and that the said Lease and Option was given for a period of ten years from the 10th day of December, 1933, and that said \$50,000.00 was to be paid as follows: \$10,000.00 at the time of notice to the owners of the exercising of said Option and \$10,000.00 every six

months thereafter until the full sum of \$50,000.00 had been paid. It is also provided in said lease and option, "It is further agreed that seventy-five per cent (75%) of the royalties and rental payments paid under this lease shall be applied and credited upon the purchase price of the said three-fourth ( $\frac{3}{4}$ ) interest in said property herein provided to be sold in event the second parties exercised said option and purchase said property hereunder, and shall from time to time be credited upon the installment of purchase price next becoming due and payable after the first installment herein mentioned."

3. The said petition affirmatively shows that on the 25th day of May, 1937, the Mount Gaines Mining Company, by notice in writing, notified the owners of the said mining claim that it elected to exercise said Option and directed the said owners to apply three-fourths of the royalties and rentals theretofore paid to the said owners upon the purchase price of said property.

4. That at the time of the notice of the exercise of said Option to said owners the Mount Gaines Mining Company had paid the owners the sum of \$17,418.48 in royalties and rentals and that it was entitled to have three-fourths of that sum, to-wit: the sum of \$13,063.86, applied upon the purchase price of said three-fourths interest of said mining claims.

5. That from the time of the notice of the exercising of said Option, May 25th, 1937, until Au-

gust 28th, 1939, the Mount Gaines Mining Company had paid an additional sum of \$49,532.89 in royalties and rentals to the owners of said property, California Pacific Title and Trust Company, making the total payments of royalties and rentals to said date, August 28th, 1939, \$66,951.69. That three-fourths of said sum, to-wit: the sum of \$50,213.53, the Mount Gaines Mining Company was entitled to have applied upon the purchase price of said three-fourths interest of said mining claims. That by all of said payments herein, to-wit: the sum of \$50,213.53, the said Mount Gaines Mining Company had become the owner and was entitled to a deed for three-fourths of all of the said mining claims.

6. The said petition affirmatively shows that the said owners, to-wit: California Pacific Title & Trust Company and Title Insurance and Guaranty Company, had refused to apply any of the royalties and rentals paid to them upon said purchase price and refused and continues to refuse to make such conveyance.

7. That the Court erred in granting the motion and directing the proceedings to be dismissed.

Appellant designates the following records which he thinks necessary for the consideration of such points.

1. Petition for Order to Show Cause with the Exhibits A, B, and C attached thereto, Page 2 to Page 21 inclusive of cert. record.

2. Amendment to Petition, Page 76 and Page 77 of cert. record.

3. Motion of respondent, California Pacific Title and Trust Company, to dismiss proceedings and to quash service of process, Page 32 to Page 34 both inclusive, of cert. record. This motion is made by all the other respondents on the same ground.

4. Opinion of the Court, Page 81 to Page 85 both inclusive, of cert. record.

5. Minutes of the Court Dismissing Proceedings, Page 80 of cert. record.

Dated this 28th day of December, 1942.

JAMES T. BOYD,

Attorney for Appellants.

217 E. C. Lyon Building,

Reno, Nevada.

[Endorsed]: Filed Dec. 30, 1942.

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[Title of Circuit Court of Appeals and Cause.]

**DESIGNATION OF ADDITIONAL PARTS OF  
THE RECORD WHICH APPELLEES  
DEEM MATERIAL**

Appellees, California Pacific Title & Trust Company and Title Insurance and Guaranty Company, pursuant to Rule 19 of the above entitled Court, hereby designate the following parts of the record which they deem material for a consideration of the appeal herein in addition to those parts of the record designated by appellees, to-wit:

1. Affidavit of W. H. Smith, Jr. and affidavit of Harry Geballe filed in support of motion of respondent below, California Pacific Title & Trust Company to dismiss proceeding and to quash service of process, pages 35 to 39, inclusive, of the certified record.

2. Affidavits of Walter C. Clark and A. V. Salerno filed with the motion of respondent below, Title Insurance and Guaranty Company in support of its motion to dismiss proceedings and to quash service of process, pages 27 to 31, inclusive, of the certified record.

3. Motion of respondent Title Insur. and Guaranty Co. to dismiss proceeding and to quash service of process, p. 24 and 25.

EDWARD D. LANDELS

THOMAS E. PALMER

Attorneys for Appellees,

California Pacific Title &  
Trust Company, Title In-  
surance and Guaranty Com-  
pany.

[Endorsed]: Filed Jan. 9, 1943.



No. 10,333

IN THE  
**United States Circuit Court of Appeals**  
For the Ninth Circuit

JAMES P. HART, Trustee of International  
Mining & Milling Company (a corpo-  
ration), Debtor and Mount Gaines Min-  
ing Company (a corporation), Debtor,  
*Appellant,*  
vs.

CALIFORNIA PACIFIC TITLE AND TRUST  
COMPANY (a corporation), TITLE IN-  
SURANCE AND GUARANTY COMPANY (a  
corporation), HUMPHREY ESTATES, INC.  
(a corporation), HARRY LEE JONES,  
ARTHUR J. EDWARDS, D. R. GUSTAVE-  
SON, JAMES S. HAZEN, PERSIS E. HAZEN,  
BYRON HALVERSON and JOSEPH J.  
MUELLER,  
*Appellees.*

**BRIEF FOR APPELLANT.**

JAMES T. BOYD,  
E. C. Lyon Building, Reno, Nevada,  
*Attorney for Appellant.*

**FILED**

FEB - 5 1943

**PAUL P. O'BRIEN,**  
CLERK



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No. 10,333

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

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JAMES P. HART, Trustee of International Mining & Milling Company (a corporation), Debtor and Mount Gaines Mining Company (a corporation), Debtor,  
*Appellant,*

vs.

CALIFORNIA PACIFIC TITLE AND TRUST COMPANY (a corporation), TITLE INSURANCE AND GUARANTY COMPANY (a corporation), HUMPHREY ESTATES, INC. (a corporation), HARRY LEE JONES, ARTHUR J. EDWARDS, D. R. GUSTAVESON, JAMES S. HAZEN, PERSIS E. HAZEN, BYRON HALVERSON and JOSEPH J. MUELLER,

*Appellees.*

## BRIEF FOR APPELLANT.

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### STATEMENT AS TO PLEADINGS AND JURISDICTION.

This proceeding was commenced by James P. Hart, as the duly appointed, qualified and acting trustee of the International Mining and Milling Company, a corporation, Debtor, in proceedings for reorganiza-

tion of a corporation, No. A-34-A, and the Mount Gaines Mining Company, a corporation, Debtor, in proceedings for reorganization of a corporation, No. A-35-A, under Chapter X of the Bankruptcy Act of the United States then pending in the District Court of the United States, in and for the District of Nevada.

A petition was filed in the District Court of the United States, in and for the District of Nevada, asking for an order to show cause directed to the California Pacific Title & Trust Company, the Title Insurance and Guaranty Company, the Humphrey Estates, Inc., Harry Lee Jones, Arthur J. Edwards, D. R. Gustaveson, James S. Hazen and Persis E. Hazen, Byron Halverson and Joseph J. Mueller, why they failed and refused to convey to the Mount Gaines Mining Company the title to three-fourths interest in certain mining properties mentioned and set forth in the Lease and Option given by J. W. Humphrey to Carl W. Yates and J. E. Binns on December 16, 1933, the predecessors in interest of the California Pacific Title & Trust Company and the Title Insurance & Guaranty Company.

The petition shows the following facts:

That on the 16th day of December, 1933, J. W. Humphrey, the legal owner of certain mining claims situated in Mariposa County, State of California, made and executed a lease for ten years for the said mining claims to Carl W. Yates and J. E. Binns and at the same time included in said lease to the said Yates and Binns an option to purchase an undivided

three-fourths interest in all of said mining claims for the sum of \$50,000.00 at any time within the period of the lease or any extension thereof provided the lease should be in force and effect.

The option further provides:

“Said owner, for and by the considerations and agreements herein therefore grants unto the Lessees an option to purchase an undivided three-fourths ( $\frac{3}{4}$ ) interest in said mine, property and all appurtenances thereof for the sum of Fifty Thousand Dollars (\$50,000.00) at any time within the period of this lease and or any extension of time thereof; provided this lease shall be in force and effect. Said purchase price shall be payable as follows: Ten Thousand Dollars (\$10,000.00) to be paid in cash at the time of notice to the first party of the exercising of said option to purchase, and a like sum of Ten Thousand Dollars (\$10,000.00) to be paid on or before the expiration of each and every period of six (6) calendar months thereafter, until said purchase price of Fifty Thousand Dollars (\$50,000.00) shall be fully paid. It is further agreed that seventy-five per cent (75%) of the royalties and rental payments paid under this lease shall be applied and credited upon the purchase price of the said three-fourth ( $\frac{3}{4}$ ) interest in said property herein provided to be sold in event the second parties exercise said option and purchase said property hereunder, and shall from time to time be credited upon the installment of purchase price next becoming due and payable after the first installment herein mentioned.”

(Tr. p. 23.)

That on or about the 1st day of December, 1934, said lease and option was assigned to the Mount Gaines Mining Company, one of the debtors in reorganization, and the said Mount Gaines Mining Company thereupon entered into the possession of all of the said mining claims under said lease and option and ever since said time has been, and now is, in the sole and exclusive possession of all of said mining claims.

That while the Mount Gaines Mining Company was in possession of all of said mining claims, by virtue of said lease and option, the Superior Court of the State of California, in and for the County of Mariposa, in an action therein pending entitled J. W. Humphrey, Plaintiff, vs. Mt. Gaines Metals, Inc., et als., by its decree duly made February 21, 1936, directed said J. W. Humphrey to convey the legal title to all of said mining claims to the California Pacific Title & Trust Company, as trustee of such legal title and in trust for W. H. Holcomb, Harry Lee Jones, and C. F. Humphrey, as tenants in common and the said J. W. Humphrey did so convey the said legal title to said mining claims to the California Pacific Title & Trust Company, as trustee.

That on or about the 25th day of May, 1937, the Mount Gaines Mining Company duly and regularly served a written notice upon C. F. Humphrey, W. H. Holcomb, Harry Lee Jones and the California Pacific Title & Trust Company, Trustee, that the Mount Gaines Mining Company,



“hereby elects to exercise, and does exercise, the option to purchase mentioned in the above named agreement.”

Also, the said notice directed the said C. F. Humphrey, et als., to apply three-fourths of all of the royalty payments, theretofore paid, upon the purchase price of said mining claims.

(Tr. p. 25.)

That at the time the notice of exercise of the option was served on Humphrey and others mentioned, the Mount Gaines Mining Company had paid to J. W. Humphrey and the California Pacific Title and Trust Company the sum of \$17,418.48 in royalties.

That the amount to be applied on the purchase price on said date, to-wit, 75% of the above amount, was \$13,063.86; \$10,000.00 to be applied on the first payment and the remainder to be applied on the next payment coming due six months thereafter. The California Pacific Title & Trust Company, by its letter dated June 9, 1937, refused to apply any of the royalty payments upon the first payment or the purchase price.

(Ex. “C”, Tr. p. 26.)

That from May 25, 1937, until August 28, 1939, the Mount Gaines Mining Company paid the additional sum of \$49,532.89 in royalties to the California Pacific Title & Trust Company, making the total payments of royalties as of said date, August 28, 1939, the sum of \$66,951.69.

That under the direction of the notice of May 25, 1937, to apply three-fourths of all royalties paid in upon the purchase price of the undivided three-fourths interest of the mining claims set out in the lease and option, it would have made the amount paid upon three-fourths interest \$50,213.53, being an overpayment of \$213.53.

That since the 28th day of August, 1939, the said Mount Gaines Mining Company became, and was, the owner of an undivided three-fourths interest in all of the mining claims mentioned in the lease and option. The petition sets out that the Trustee continued to make payments from August 29, 1939, until the time of filing the petition in the District Court, amounting to the sum of \$26,199.64, and that there is due and owing to the Trustee the sum of \$26,199.64 on account of overpayments made to the California Pacific Title & Trust Company and the Title Insurance and Guaranty Company for their beneficiaries and that the same has not been paid nor any part thereof.

Motions were made by the respondents to dismiss the action upon various grounds, want of jurisdiction in the Court to hear and determine the matter and to dismiss said petition and proceedings based thereon, "on the ground that said petition fails to state a claim upon which any relief can be granted against this respondent."

(Motion of Respondent, Title Insurance & Guaranty Company, Tr. pp. 29-30.)

(Motion of Respondent, California Pacific Title & Trust Company, Tr. pp. 37-38.)

The petition and motions present a question of law in a controversy arising over the ownership of three-fourths interest in the mining claims set out in the lease and option, as appears from the copy of the lease and option attached to the petition herein; the said property being property in the custody and control of the United States District Court for the District of Nevada. That Court had exclusive jurisdiction over the debtors, Mount Gaines Mining Company and its property wherever located by virtue of Chapter X, Corporate Reorganization, U.S.C.A. Title 11, Section 511, U.S.C., Title 1-16, Section 511.

The Court rendered its decision on the motions on the 25th day of September, 1942, and granted the motions to dismiss without prejudice. The Order was entered in the minutes of the Court on the same day.

(Tr. pp. 45-53.)

The Notice of Appeal was filed September 25, 1942. The Transcript of Record on Appeal was filed by the Clerk of this Court on December 23, 1942, and the printed record was filed within the time required by law and the rules of this Court.

The statutory provisions believed to sustain the jurisdiction of this Court are Section 24 of the Bankruptcy Act, Section 47, U.S.C., Title 1-16, Section 47, U.S.C.A., Title 11.

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#### **STATEMENT OF THE CASE.**

This is an appeal from an order in the District Court of the United States, in and for the District

of Nevada, duly made and entered on the 25th day of September, 1942, granting a motion to dismiss, and dismissing, proceedings instituted by the Trustee for the debtor corporations.

(Tr. p. 45.)

On the 16th day of December, 1933, J. W. Humphrey, the owner of certain mining claims situate in Mariposa County, State of California, made and executed a lease and option to Carl W. Yates and J. E. Binns of Los Angeles, California, for the said mining claims known as the Mount Gaines.

(Tr. p. 19.)

This lease and option was assigned to the Mount Gaines Mining Company on the 1st day of December, 1934.

(Tr. pp. 5-6.)

The lease and option required: "That Lessees shall perform at least fifty (50) shifts of mine work in rehabilitation of said mine, or exploration, exploitation, development and improvement of said mine as shall be such as is necessary in good mining; and in the second calendar month and each following calendar month thereafter shall perform at least ninety (90) shifts per month."

"That Lessees shall pay as a royalty to the Owner ten per cent (10%) of all production of and from said mine, from the gross returns of ores shipped and sold, the returns from all recovery of ores milled, concentrates, amalgams, mint returns on bullion. Said royalty payments to be considered as a rental only, and all such payments to be made in and through the

Security First National Bank of Los Angeles, California.”

(Tr. p. 20.)

“That all payments shall be made and accompanied by a duplicate copy of such returns, not later than the 25th day of following calendar month; and that upon said 25th day Lessees shall make in writing a full report of all operations, developments, and exposures of moment.”

(Tr. p. 21.)

The lease and option further required: “That the Lessees shall pay and discharge when due and when delinquent all taxes hereinafter accruing against the Mine and its improvements and shall do all assessment work as required by law, make the necessary affidavits and record the same at their own expense.”

“That said Lessees shall use all diligence in the protection and continuity of title of all present existing mining, mineral locations, water and tailing rights and those that may legally accrue under the maintenance and operation of said Mine property at their own expense:”

“That the Lessees further agree that all equipment and improvements shall be then deemed affixed thereto and become a part of said Mine and subject to this lease and option:”

(Tr. p. 21.)

The lease and option further required: “That the Lessees shall carry legal compensation insurance on all men by them employed and shall keep complete

records of operations, accounts, mining maps and production. \* \* \*”

“It is further agreed that any contiguous mining ground that can and may be located and any water or water rights that may be denounced or in any wise acquired for use of operations of said Mine or mill, shall forthwith become the property of said Mine and the Owner thereof and included in this lease and option.”

(Tr. p. 22.)

The option, the cause of the controversy in this matter, is as follows:

“Said owner, for and by the considerations and agreements herein therefore grants unto the Lessees an option to purchase an undivided three-fourths ( $\frac{3}{4}$ ) interest in said mine, property and all appurtenances thereof for the sum of Fifty Thousand Dollars (\$50,000.00) at any time within the period of this lease and or any extension of time thereof; provided this lease shall be in force and effect. Said purchase price shall be payable as follows: Ten Thousand Dollars (\$10,000.00) to be paid in cash at the time of notice to the first party of the exercising of said option to purchase, and a like sum of Ten Thousand Dollars (\$10,000.00) to be paid on or before the expiration of each and every period of six (6) calendar months thereafter, until said purchase price of Fifty Thousand Dollars (\$50,000.00) shall be fully paid. It is further agreed that seventy-five per cent (75%) of the royalties and rental payments paid under this lease shall be applied and credited upon the purchase price of

the said three-fourth ( $\frac{3}{4}$ ) interest in said property herein provided to be sold in event the second parties exercise said option and purchase said property hereunder, and shall from time to time be credited upon the installment of purchase price next becoming due and payable after the first installment herein mentioned.”

(Tr. p. 23.)

On May 25, 1937, the Mount Gaines Mining Company notified C. F. Humphrey, W. H. Holcomb, Harry Lee Jones and the California Pacific Title & Trust Company, Trustee, by its written notice, “hereby elects to exercise, and does exercise, the option to purchase mentioned in said above named agreement”; and made a demand upon them that the said owners apply three-fourths of the royalties, claiming that three-fourths of the royalties amounted to over \$10,000.00 and demanded that they be applied upon the first payment upon the purchase price.

(Ex. B, Tr. p. 25.)

As a matter of fact, the petition shows that at the time the notice was served, the Mount Gaines Mining Company had actually paid in royalties, \$17,418.48, and that three-fourths of that amount was \$13,063.86 that could be applied upon the purchase price.

(Tr. p. 7.)

The California Pacific Title & Trust Company was the only one that answered the notice and they refused to apply the royalties upon the first payment and claimed that the notice did not constitute an elec-

tion to exercise the option for the reason that the sum of \$10,000.00 did not accompany the notice.

(Ex. C, Tr. pp. 26-27.)

Motions challenging the jurisdiction of the Court to hear the case and motions challenging the jurisdiction of the Court over the defendants were also made but the decision of the Court dismissing the case was made solely upon its opinion that the option had not been exercised for the failure to make the \$10,000.00 payment.

(Opinion of Court, Tr. p. 46.)

The conclusions of the Court are embodied in the last two paragraphs of the Court's opinion.

“The express language of the lease and option agreement leaves no basis for an interpretation that the said payments, made prior to election to exercise the option, specifically declared ‘to be considered as rental only’ may, by such mere declaration of exercise of option, be so changed in character that three-fourths of the amount thereof, theretofore paid, ceases to be ‘rental only’, as expressly designated in the agreement, but the property of the lessee and optionee and applicable, if sufficient in amount, to payment not only of the first installment but that of any or all the others.”

“The said Debtor, not having tendered a cash payment of the full amount of the first installment of the total option purchase price, at the time of giving written notice of the claimed exercise of such option, such option has not as yet been complied with and the Trustee is not entitled



to the relief prayed for in his petition. James on Option Contracts Secs. 813-817; 35 C. J. 1038-1042, secs. 181-187.”

“The motions to dismiss are granted without prejudice.”

(Tr. pp. 52-53.)

From the Court’s opinion it appears and is fairly deducible from it that before the option could be exercised:

a. That it is necessary that a payment of \$10,000.00 in cash accompany the notice of the exercise of the option.

b. That the failure to make such payment released the owners of any obligation to apply three-fourths of the royalties heretofore paid them on the purchase price of the mining property.

c. After the first installment is paid in cash the 75% of the said royalty payments are to be credited upon the ensuing purchase price installments as they fall due and not as rental only.

d. That all payments of royalties and rentals paid prior to the notice of the exercise of the option could not be applied upon the purchase price.

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### **ARGUMENT.**

There are only two questions involved in this appeal:

1. Was the option, embodied in the lease, exercised by the notice of May 25, 1937?

2. If the option was exercised was the appellant entitled to have 75% of the royalties that had been paid applied upon the purchase price of the property and on the first installment?

The option has two clauses. The first one provides for a privilege, to be exercised at any time during the life of the lease, to purchase a three-fourths interest, "in the mine property and all appurtenances thereof", for the sum of \$50,000.00, provided the lease shall be in force and effect. Said purchase price shall be payable as follows: "\$10,000.00 to be paid in cash *at the time of notice to the first party of the exercising of said option to purchase* and a like sum of \$10,000.00 to be paid on or before the expiration of each and every period of six calendar months thereafter until said purchase price of \$50,000.00 shall be fully paid.

The second clause of the option provides: "It is further agreed that 75% of the royalty and *rental* payments paid under this lease shall be applied and credited upon the purchase price of said three-fourths interest in said property herein provided to be sold *in event second parties exercise said option and purchase said property hereunder.*" It is this last clause upon which the appellants herein claim the right to have the rentals and royalties heretofore paid applied upon the purchase price and requested to have applied upon the first installment of \$10,000.00.

The only qualification required by that clause to have the royalties and rentals applied upon the pur-

chase price was, "in event the second parties exercise said option and purchase said property hereunder".

The option granted by the owners of the property to the lessees was a part of the lease given by the owner of the Mount Gaines Mine to Yates and Binns and dated December, 1933, and assigned to the Mount Gaines Mining Company.

The option was granted on account of the agreements contained in the lease and is supported by a valuable consideration, that is, "the payment of 10% of all production of and from said mine, from the gross returns of ores shipped and sold, the returns from all recovery of ores milled, concentrates, amalgams, mint returns on bullion"; "the doing of at least 90 shifts of work per month"; "pay and discharge when due and when delinquent all taxes accruing on the mine and its improvements and shall do all assessment work as required by law"; "use all diligence in the protection and continuity of title of all present existing mining, mineral locations, water and tailing rights, and those that may legally accrue under the maintenance and operation of said mine property"; "that any contiguous mining ground that can and may be located and any water or water rights that may be denounced or in any wise acquired for use of operations of said Mine or mill, shall forthwith become the property of said Mine and the Owner thereof and included in this lease and option:"; all this at the expense of the lessees; "that all equipment and improvements shall be then deemed affixed to

the mine and become a part of said mine and subject to this lease and option”.

(Tr. pp. 20-21-22.)

The option, by providing the royalties and rentals paid to the lessor, or the owners, could be applied upon the purchase price, gave the lessees a continuing interest in 75% of that fund and, in fact, created a right to that fund if the lessees exercised the option and assume the liability to pay \$50,000.00 for the three-fourths interest.

The notice of the exercise of the option, “hereby elects to exercise, and does exercise, the option to purchase mentioned in said above named agreement”, changed that option into an agreement of sale on the part of the lessor and an agreement to purchase upon the part of the lessee and created a liability against the lessee of \$50,000.00.

(Tr. p. 25.)

“The option had at least the force of an offer to sell, and the acceptance of this offer before it had expired or had been revoked constituted a valid and binding contract from which neither party could recede.”

*Smith v. Bangham*, 156 Cal. page 363.

“Such an unqualified and unconditional acceptance creates a contract of purchase and sale, in which an action for specific performance will lie. Such contract is enforceable in equity, as a written contract embodying the same terms, and subscribed by the seller and purchaser, would be enforced.”

*Horgan, et als., v. Russell*, 43 L.R.A. (NS) p. 1150;

*Turner v. McCormick*, 67 L.R.A. p. 853;  
*Johnson v. Trippe*, 33 Fed. p. 530;  
*W. G. Reese Co. v. House*, 162 Cal. p. 740;  
*Pollock, et als., v. Brookover*, 6 L.R.A. (NS)  
p. 403.

It was that clause of the option which permitted them to apply 75% of the royalties and rentals on the purchase price that gave them a right to protect themselves in the investment of their money in improvements, mills, equipment and other appliances used either in the development or exploitation of the mines and it must certainly have been a great inducement to the lessees to accept and sign a written lease that obligated them to the extent which the lease did in this case.

The condition attached to the option for the right to have the royalties and rentals paid applied upon the purchase price is set out in the option as, "in event second parties exercise said option and purchase said property hereunder". It is the contention of the appellant herein that the notice served of the exercise of the option became an agreement of sale and purchase and a debt or liability on the part of the appellant in favor of the owners of the property. That agreement made the appellant the equitable owner of all of the mining claims.

Equity regards that as done which ought to be done.

The agreement of sale and purchase made the lessor the vendor and the lessee the vendee under the contract. While the law would regard the vendor as

still the legal owner of the land, equity applied a different rule and the maxim, "equity regards and treats that as done which in good conscience ought to be done" comes into play.

"Effect of an Executory Contract in Equity.—The full significance of the principle that equity regards and treats as done what ought to be done throughout the whole scope of its effects upon equity jurisprudence is disclosed in the clearest light by the manner in which equity deals with executory contracts for the sale of land or chattels which presents such a striking and complete contrast with the legal method above described. While the legal relations between the two contracting parties are wholly personal,—things in action,—equity views all these relations from a very different standpoint. In some respects, and for some purposes, the contract is executory in equity as well as at law; but so far as the interest or estate in the land of the two parties is concerned, it is regarded as executed, and as operating to transfer the estate from the vendor and to vest it in the vendee. By the terms of the contract the land ought to be conveyed to the vendee, and the purchase price ought to be transferred to the vendor; equity therefore regards these as done: the vendee as having acquired the property in the land, and the vendor as having acquired the property in the price. The vendee is looked upon and treated as the owner of the land; an equitable estate has vested in him commensurate with that provided for by the contract, whether in fee, for life, or for years; although the vendor remains owner of the legal estate, he holds it as a trustee for the vendee, to whom all

the beneficial interest has passed, having a lien on the land, even if in possession of the vendee, as security for any unpaid portion of the purchase-money.”

*Pomeroy's Equity Jurisprudence*, Fourth Edition, Section 368, page 685.

“This principle, so brief in its statement, is most broad in its application, and fruitful in its results; from it, as the root, spring a large part of the rules which make up the body of equitable jurisprudence. Apply the principle to the present case. By the terms of the contract, the land ought to be conveyed to the vendee, and the purchase-money ought to be transferred to the vendor; equity, therefore, regards these as done—the vendee as having acquired the property in the land, and the vendor as having acquired the property in the price. The vendee is looked upon and treated as owner of the land; an equitable estate has vested in him commensurate with that provided for by the contract, whether in fee, for life, or for years; although the vendor remains owner of the legal estate, he holds it as a trustee for the vendee to whom all the beneficial interest has passed.”

*Pomeroy on Contracts*, Specific Performance, Second Edition, Section 314, page 400.

The intention of the parties must control the construction to be given to the contract; and this intention is to be found in the lease and option. But in construing the contract the Court has no right to disregard one of its clauses in favor of another clause. Both clauses should be given effect, if they are not

repugnant; and the intention of the parties must be gathered from the entire instrument. In this case, the contract includes the lease and the option; but the option, being special, must first be consulted as to what the intentions of the parties were.

It is to be noticed that in the option it states,

“Said owner for and by the considerations and agreements herein therefore grants unto the lessee an option to purchase an undivided three-fourths interest in said mine and property and all appurtenances thereto for the sum of \$50,000.00 at any time within the period of this lease or any extension thereof; provided this lease shall be in force and effect. Said purchase price shall be payable as follows: \$10,000.00 to be paid in cash at the time of notice to the first party of the exercising of said option to purchase and a like sum of \$10,000.00 to be paid on or before the expiration of every six calendar months thereafter until said purchase price of \$50,000.00 shall be paid.”

That clause is general in its nature and permits the lessee to pay the entire \$50,000.00 at any time during the life of the lease or to pay it in installments of \$10,000.00 every six months. It also has the effect of fixing the time when these payments begin to run. That is to say, they commence at the time of notice to the first party of the exercise of said option to purchase. That clause has a dual effect. It changes the option into an agreement of sale and purchase and creates a debt of \$50,000.00 due from the lessee to the lessor, \$10,000.00 of which debt becomes immediately due and payable.



The second clause in the option states:

*“It is further agreed that 75% of the royalty and rental payments paid under this lease shall be applied and credited upon the purchase price of said three-fourths interest.”*

This is a right granted to the lessee to have 75% of monies already paid to the lessors applied upon the purchase price. There is no limitation in that clause. When it speaks of purchase price it means \$50,000.00 and it does not exclude in any way the application of that money upon the first installment. To do so it would be necessary to insert in that agreement an exception that the royalty and rental payments could not be applied upon the first installment or appropriate words to that effect.

To give effect to the Court's opinion or order it would make 75% of the royalties and rentals that had been paid to be applied only upon four-fifths of the purchase price. It would be more in consonance with the intention of the parties to hold that 75% of the royalties theretofore paid should amount to \$10,000.00 or if it be less than that amount that the lessee would have to pay a sufficient amount when taken with the 75% of the royalties would make the first installment of \$10,000.00. All that the lessor could claim in view of that option as a whole was that he was entitled to \$10,000.00 on the first installment either from the royalties or the lessees or both but the first payment should be \$10,000.00. (In other words, if 75% of the royalties and rentals did not amount to the full sum of \$10,000.00 the lessee would have to make up the difference.)

Further, the expression in the clause of the option:

“and shall from time to time be credited upon the installment of purchase price next becoming due and payable after the installment herein mentioned.”

simply continues in force that portion of the lease which requires the royalties to be paid on the 25th day of the month following the month in which the ores had been sold. When such royalties are paid they shall then be credited upon the installment next payable regardless of the six months clause in the first clause of the option. In other words, prevented the lessee from holding back 75% of the royalties and pay that in under the six months clause.

“The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other.”

*Cal. C. C. Section 1641.*

“In construing written instruments, the only rule of much value—one which is frequently shadowed forth, but seldom, if ever, expressly stated in the books—is to place ourselves as near as possible in the seats which were occupied by the parties at the time the instrument was executed; then, taking it by its four corners, read it.”

*Walsh v. Hill*, 38 Cal. 482;

*Barnett v. Barnett*, 104 Cal. 298.

“Particular clauses of a contract are subordinate to its general intent.”

*Cal. C. C. Section 1650.*

“A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful.”

*Cal. C. C. Section 1636;*

*Stockton Sav. & L. Soc. v. Purvis*, 112 Cal. 236, 238.

The following statement appears in the Court's decision:

“It is clear from a reading of the ‘agreement of lease with option to purchase’ that, if such option is not exercised or until it is exercised to the extent of first payment, the legal relationship of the parties continues only as that of lessor and lessee. Until there is ‘notice’ of exercise of the ‘option to purchase’, accompanied with ‘cash’ payment, of first installment, it is specifically provided that the ‘royalty’ payments of ‘ten per cent (10%) of all production’ are ‘to be considered as rental only’. If the option is in part exercised, by the payment of one or more of the installment payments, ‘as in the agreement of lease with option’ provided, then, until final payment is made, ‘seventy-five per cent (75%) of the royalties and rental payments \* \* \* and shall from time to time be credited upon the installment of purchase price next becoming due and payable after the first installment herein mentioned’. The above quoted expression, ‘royalties and rental payments’, clearly refer to the preceding expression—‘Lessees shall pay as a royalty to the Owner ten per cent (10%) of all production \* \* \*. Said royalty payments to be considered as rental only, \* \* \*’. After the first install-

ment is 'paid in cash', then 75% of the amount of said 'royalty payments' are to be credited upon the ensuing purchase price installment payments as they fall due, and not 'as rental only'."

(Tr. pp. 51-52.)

The answer to the above quoted statement of the Court is found in the lease and option itself. The option makes no distinction between rentals and royalties but declares:

"It is further agreed that seventy-five per cent (75%) of the royalties and rental payments paid under this lease shall be applied and credited upon the purchase price of the said three-fourth ( $\frac{3}{4}$ ) interest \* \* \*"

(Tr. p. 23.)

The further statement of the Court,

"After the first installment is 'paid in cash', then 75% of the amount of said 'royalty payments' are to be credited upon the ensuing purchase price installment payments as they fall due, and not 'as rental only'."

(Tr. p. 52.)

is not supported by the option nor the lease. The only requirement as appears in the option is in the first clause:

"Said purchase price shall be payable as follows: Ten Thousand Dollars (\$10,000.00) to be paid in cash at the time of notice to the first party of the exercising of said option to purchase"

(Tr. p. 23.)

that uses the statement, "purchase price". There is no purchase price until the option is exercised and the purchase price is \$50,000.00 and the first installment of the purchase price is made payable at the time of notice to the first party.

Further, as it is expressed in the opinion, the Court required that \$10,000.00 accompany the notice of the exercise of the option before the option could be exercised. Evidently the Court considered the payment of the money to be the exercise of the option or that the payment of the money was necessary to the exercising of the option. This is not supported by the authorities heretofore cited in this brief and, further, the intention of the parties at the time the lease was signed shows that that was not their intention.

In the first clause of the option it provides that notice of the exercise of the option shall be given to the first party of the lease, the language used, being:

"Ten Thousand Dollars (\$10,000.00) to be paid in cash at the time of notice to the first party of the exercising of said option to purchase,"

(Tr. p. 23.)

but the money was to be paid as appears from the following covenant:

"It is agreed that in the event the Lessees exercising the before mentioned option to purchase, the payment shall be made in the Bank before mentioned herein and that the Owner shall upon notice of such tender of payment deposit in said Bank a good and sufficient deed of convey-

ance to the Optionees for the three-fourth ( $\frac{3}{4}$ ) interest.”

(Tr. p. 24.)

It is clear from those two clauses that the notice of exercise of said option should go to the owner; payment of the money should be made to the Security First National Bank of Los Angeles; the notice to J. W. Humphrey at San Francisco, California; the money sent to Los Angeles.

Further, in that clause it uses the language:

“that in the event the Lessees exercising the before mentioned option to purchase, the payment shall be made \* \* \*”

WHEREFORE, appellant prays that this Court reverse the Order of the District Court granting the motions of respondents to dismiss and dismissing the proceedings instituted by the Trustee.

Dated, Reno, Nevada,  
February 5, 1943.

JAMES T. BOYD,  
*Attorney for Appellant.*

16  
No. 10333

11  
IN THE

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

---

JAMES P. HART, Trustee of International Mining & Milling Company (a corporation), Debtor, and Mount Gaines Mining Company (a corporation), Debtor,

*Appellant,*

*vs.*

CALIFORNIA PACIFIC TITLE AND TRUST COMPANY (a corporation), TITLE INSURANCE AND GUARANTY COMPANY (a corporation), HUMPHREY ESTATES, INC. (a corporation), D. R. GUSTAVESON, JAMES S. HAZEN, PERSIS E. HAZEN, BYRON HALVERSON and JOSEPH J. MUELLER,

*Appellees.*

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BRIEF OF APPELLEES, BYRON HALVERSON  
AND JOSEPH J. MUELLER.

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*Appellees.*

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## BRIEF OF APPELLEES, BYRON HALVERSON AND JOSEPH J. MUELLER.

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As we view it, there are only two questions involved in this case:

- (1) DOES THE OPTION BY ITS TERMS REQUIRE THE DOWN PAYMENT OF \$10,000.00 TO EFFECTUATE ITS EXERCISE?
- (2) SHOULD IT BE SO CONSTRUED?
  - (a) By reason of practical construction.
  - (b) Waiver and Estoppel.
  - (c) Laches.

I.

If the Option by Its Terms Required the Down Payment of \$10,000.00 Cash, at the Time of Its Exercise, the Option Was Never Properly Exercised, and We Are Not Concerned With How Much Royalty Payments Have Been Made, or How Royalty Payments Should Be Applied After Exercise. Non Constat It Will Ever Be Exercised.

We agree that an option, during its existence, is a continuing offer in accordance with its terms. Until it is exercised by acceptance, it is not converted into a contract of purchase and sale, and the optionee continues to hold under the lease. All payments of royalties apply as rental only. In order to bring the option into play, it was necessary to comply with its terms, to wit, the payment of \$10,000.00 in cash at the time of its exercise.

“Said owner \* \* \* grants \* \* \* an option \* \* \* to purchase \* \* \* for the sum of \$50,000.00 at any time within the period of this lease or any extension of time thereof; provided, this lease shall be in force and effect. Said purchase price shall be payable as follows: Ten Thousand Dollars (\$10,000.00) to be paid in cash *at the time of notice* to the first party of the exercising of said option to purchase, and a like sum \* \* \* to be paid on or before the expiration of each and every period of six months thereafter, until said purchase price of \$50,000.00 shall be fully paid.”

The option does not provide that all rentals or royalties theretofore paid shall be applied on the down payment. If that had been so intended, it could have been easily so stated. To so construe the option, would be to read

something into the contract that is not there. The provision that "that seventy-five per cent (75%) of the royalties and rental payments paid under this lease shall be applied and credited upon the purchase price \* \* \* herein provided to be sold in the event the second parties exercise said option and purchase said property hereunder" can only be reasonably construed to refer to payments made after the exercise of the option. All payments theretofore made were simply rental, and no part of the \$50,000.00 purchase price.

In the business world, leases of property with an option to purchase are of frequent occurrence. In practice, until the exercise of the option, rental payments are applied for its use. That is the agreement. The rental compensates for use, but when the option is exercised, the relation of vendor and vendee arises. Then, and not until then, the vendor has agreed to sell, and the vendee has agreed to buy, at the purchase price agreed on. In the instant case, \$10,000.00 down, and \$10,000.00 every six months thereafter until \$50,000.00 shall have been paid. Supposing, at the time of the attempted exercise, more than \$50,000.00 had been paid as royalties. Could the lessee demand a deed without further payment? Could it recover the excess paid as rental, as attempted here? Mining operations are frequently carried on under lease and option, but until the option has been exercised, it is usually provided that the royalties should be applied, as rental for the use. When exercised, the rents or royalties are usually applied on the purchase price, because, at that time, the relation is changed from landlord and tenant to that of vendor and purchaser. After that, what was denominated as rental in the lease is converted into

payments on the purchase price. In doing this, we are not doing violence to the language of the agreement and we are not reading something into the option.

“Contracts of this character, being unilateral in their inception, are construed strictly in favor of the maker, because the other party is not bound to the performance, and is under no obligation to buy, and it is generally held that time is of the essence of the contract, and the conditions imposed must be performed in order to convert the right to buy into a contract of sale.”

*Winder v. Kenan*, 161 N. C. 628 (633);

*Kolachny v. Galbreath*, 26 Okla. 772, 38 L. R. A. (N. S.) 451;

*Landrum v. Jordan*, 229 P. 182.

“Unilateral contracts or options for the sale of lands are to be construed most strictly in favor of the maker, and the time of performance by the one holding the option is of the essence of the contract, and the conditions imposed must be performed by him in order to convert the right to buy into a contract of sale. The maker has, however, the right to *impose conditions which must be performed precedent to the exercise of the right to buy*, and among these is the payment of the agreed price. The acceptance must be according to the terms of the contract and if these require payment of the purchase money, or any part thereof, precedent to the exercise of the right to buy, the money must be paid or tendered, and a mere notice of an intention to buy, or that the party will take the property, does not change the relation of the parties.”

*Winder v. Kenan*, 161 N. C. 628.

“An option contract may be regarded as embodying an offer. When the optionee, or the person to whom the option is made, signifies his desire to accept *in accordance with the terms of the option*, the optionor, or person making the offer, becomes obligated to perform. This acceptance of the offer contained in the option contract is called ‘election’, and it gives rise to a subsequent contract between the parties to buy or sell, or perform whatever other acts have been specified in the option contract. Penn. Min. Co. v. Smith, 207 Pa. 210, 56 Atl. 426. ‘The particular act or acts which constitute an election, may be fixed by the terms of the option as also the time when, the place where, and the person to whom it shall be made.’ James, Law of Option Contracts, Secs. 810, 817. *The language of the contract itself controls as to what act or acts constitute an election.*” (Italics ours.)

*Flickinger v. Heck*, 187 Cal. 111;

*Ide v. Lester*, 10 Mont. 5, 24 Am. St. 17.

“An ‘option’, or ‘option to purchase’ is a contract by which the owner of the property agrees with another person that the latter shall have the right to buy the former’s property at a fixed price within a certain time. In such contracts two elements exist: (1) The offer to sell, which does not become a contract until accepted. (2) The completed contract to leave the offer open for the specified time. It is characterized as a unilateral, executed contract, binding only on the optionor, and not on the optionee, and becomes a contract *inter parties* only when exercised or accepted according to its terms. If binding on both parties, it cannot be an option. The owner of the land does not sell his land or any interest in

it, or agree to sell, but he does sell the right or privilege to buy at the option of the other party.”

66 *Corp. Juris.* 485, Sec. 12;

13 *Corp. Juris.* 336, Sec. 183.

“And such option contracts must not only be certain and complete, but must be accepted in accordance with its terms. Any acceptance not in accordance with its terms is equivalent to a rejection. *Weaver v. Burr*, 31 W. V. 736, 8 S. E. 743, 3 L. R. A. 94; *Wilkin Mfg. Co. v. Lumber Co.* (Mich.), 53 N. W. 1045; *Potts v. Whitehead*, 23 N. J. Eq. 512.”

*Couch v. McCoy*, 138 Fed. 696 (701);

*Pollock v. Brookover*, 60 W. Va. 75, 6 L. R. A. (N. S.) 403.

“The very term ‘option’ indicates choice, not obligation. Such a contract is indeed binding as any contract, but only for what it specifies. As to the optionor who executes the instrument for a consideration, it is an offer made by him to sell upon certain terms which are conditions of his contract, the binding force of which is to restrain him from withdrawing the offer for a certain time. To make it a mutually binding contract, compulsory upon the proposed purchaser, the latter must accept the offer according to its terms. Like any other contract, based on offer and acceptance, *the latter must exactly coincide in all its terms with the former.* Until this occurs there is no meeting of minds between the proposer and the acceptor, and hence no contract other than the original one binding only on the man who makes the offer.”

*Hartman v. Selling*, 97 Or. 368.



“In case of the destruction of the building pending an option to purchase real estate, the optionor need not account to optionee for insurance money which he collects thereon.”

*Strong v. Moore*, 207 Pac. 179 (Or.), 23 A. L. R. 1217.

“It is competent for the optionor to provide in the option that notice of the election shall be given to himself, to a corporation, or to a third person; or to his heirs; that it shall be in writing; the time when, the place where, notice and tender shall be made; and generally, to impose such other conditions as he may desire. These stipulations and provisions are binding upon the optionee, and his election must be in accordance therewith.”

*James on Option Contracts*, Sec. 815, p. 321;  
12 *Am. Juris.* 532, Sec. 39.

“As the option must be accepted according to its terms, if by its terms it prescribes certain conditions for its acceptance, such conditions must be performed while the option is still outstanding, unless they are waived, or compliance made impossible by the vendor.”

66 *Corp. Juris.* 499, Sec. 23.

“Here the entry was under *an agreement to pay* rent, and the relation of the parties was unquestionably landlord and tenant for twenty years, up to the thirty-first day of October, 1893; and unless the notice of the defendant that he desired to avail himself of the option to purchase had the conclusive effect claimed for it, which we do not think it had, the relation of landlord and tenant is shown, by the evidence aided by the statutory presumption, to have

continued until he completed the purchase. If he had tendered the money, or had announced his ability and willingness to take the property as soon as title could be made, and nothing remained to be done but the order of the court, I can see how it might be claimed with reason that he held as purchaser pending such action. But no such state of facts existed. His notice fails to show a 'payment or tender thereof' of the money which the agreement required should be made 'at the expiration of the term of the lease.' "

*Journe v. Hewes*, 123 Cal. 244.

## II.

### **Should the Contract Be So Construed as to Require Payment of \$10,000.00 to Constitute an Election?**

The appellees, California Pacific Title and Trust Company, Title Insurance and Guaranty Company and Byron Halverson, are each trustees, the Title Companies holding the whole title, and Byron Halverson, as a trustee to an undivided one-half of an undivided one-third equitable interest in said mine.

On the 9th day of June, 1937, appellee, California Pacific Title and Trust Company, in reply to the notice of the Mount Gaines Mining Company, purporting to exercise said option, notified appellant that it could not accept the purported election to exercise the option, and that "that said purported notice is of no force or effect and does not constitute an election to exercise said purported option for the reason that the sum of Ten Thousand and no/100 Dollars in cash did not accompany your said notice, the payment thereof as a part of the purchase price being specifically provided for under the terms of said Lease". [Tr. 26.]

After that reply appellant did not undertake to stand on its election. Every month thereafter, or practically so, appellant made payment of royalty as rental to the Trustee, and the Trustee from time to time, disbursed the royalties to its beneficiaries. Does not this show that appellant acquiesced in that construction? Ever since that time, the royalties have been paid, and received, under that construction.

If appellant were right in its contention, did it not waive its "election" or purported election? And did not the continued payment under the lease amount to an acceptance of the construction placed on the option by the Title Company? Did not that constitute a practical construction?

13 *Corp. Juris.* 546, Sec. 517.

And would not appellant be estopped now, after a period of nearly five years, from claiming that the option had been exercised? Appellant stood by, permitting the royalties to be disbursed, without asserting its rights, under the purported election. 23 *C. J.* 1150, Secs. 154-155. In case of controversy, timely assertion of right is always required. There is only one conclusion: Appellant accepted the Title Companies' contention, waiving its own contention.

However, we submit that the option was never exercised and that the judgment of the Court below should be affirmed, with costs.

Respectfully submitted,

HALVERSON & HALVERSON,

By GEORGE HALVERSON,

*Attorneys for Appellees Byron Halverson and  
Joseph J. Mueller.*



No. 10,333

United States

Circuit Court of Appeals

For the Ninth Circuit

JAMES P. HART, Trustee of International Mining & Milling Company (a corporation), Debtor and Mount Gaines Mining Company (a corporation), Debtor,

*Appellant,*

vs.

CALIFORNIA PACIFIC TITLE AND TRUST COMPANY (a corporation), TITLE INSURANCE AND GUARANTY COMPANY (a corporation), HUMPHREY ESTATES, INC. (a corporation), HARRY LEE JONES, ARTHUR J. EDWARDS, D. R. GUSTAVESON, JAMES S. HAZEN, PERSIS E. HAZEN, BYRON HALVERSON and JOSEPH J. MUELLER,

*Appellees.*

**Brief of Appellees, Humphrey Estates, Inc., Harry Lee Jones, Arthur J. Edwards, James S. Hazen and Persis E. Hazen.**

FILED

MAR 6 - 1943

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No. 10,333

United States  
Circuit Court of Appeals  
For the Ninth Circuit

JAMES P. HART, Trustee of International Mining & Milling Company (a corporation), Debtor and Mount Gaines Mining Company (a corporation), Debtor,

*Appellant,*

vs.

CALIFORNIA PACIFIC TITLE AND TRUST COMPANY (a corporation), TITLE INSURANCE AND GUARANTY COMPANY (a corporation), HUMPHREY ESTATES, INC. (a corporation), HARRY LEE JONES, ARTHUR J. EDWARDS, D. R. GUSTAVESON, JAMES S. HAZEN, PERSIS E. HAZEN, BYRON HALVERSON and JOSEPH J. MUELLER,

*Appellees.*

**Brief of Appellees, Humphrey Estates, Inc., Harry Lee Jones, Arthur J. Edwards, James S. Hazen and Persis E. Hazen.**

---

The appellees submitting this brief are named in the petition for the order to show cause why they

have not joined in a conveyance of title to an undivided three fourths interest in certain mining properties (Tr. pp. 3 and 4). Included among those mentioned in the decision of the lower Court, who interposed motions to dismiss (Tr. top of p. 47), are these appellees.

In our judgment, the "opinion and decision" of the lower Court is demonstrative of the soundness of the Court's ruling (Tr. p. 46 et seq.). In addition, two other sets of appellees are filing briefs, which we have examined and which we are satisfied to adopt as a presentation of our own views. For these two reasons, this brief will be concise; repetition of the authorities and arguments embodied in the briefs of the other appellees will be avoided.

## I.

The language of the agreement plainly supports the decision and requires no construction.

For convenience, we repeat the option clause upon which the appellant's case rests, adding appropriate emphasis:

(Tr. pp. 4 and 5)

"Said Owner, for and by the considerations and agreements herein therefore grants unto the lessees an option to purchase an undivided three-fourths ( $\frac{3}{4}$ ) interest in said mine, property and all appurtenances thereto for the sum of Fifty Thousand Dollars (\$50,000.00) at any time within the period of this lease and or any extension of time thereof; provided this lease shall be in force and effect. Said purchase price shall be payable as follows: Ten Thousand Dollars

\$50,000.00 to be paid in cash at the time of notice of the first payment of the purchase price and upon purchase and a like sum of Ten Thousand Dollars \$10,000.00 to be paid on or before the expiration of each and every period of six calendar months after and said purchase price of Ten Thousand Dollars \$10,000.00 and be fully paid. The further interest and convenience payment on the royalties and rental payments and under the case and as applied and credited upon the purchase price of said first period of interest and proceeds upon the first of said period and the other periods and parties thereof and upon the purchase and proceeds thereafter and said from time to time be credited upon the installment of purchase price next becoming due and payable after the first installment herein mentioned.

It is agreed at the outset that there shall be no restriction or interpretation of the agreement. The language at the conclusion of the paragraph, which we have emphasized above, is hereby made a part of the agreement that royalties and rental payments are to be applied on the purchase price only in the event that Ten Thousand Dollars is paid in cash at the time of notice of the exercise of the option and after the first installment contemplating the payment of Ten Thousand Dollars. The designated application of the royalties and rental payments are to be applied to the purchase price.

The meaning of the contract, for which the approbation and contents, would be greatly unfair to the approbation.

The two prices may also be considered separately. The agreement was made and by express and by the parties and proceeds and royalties and rental payments are to be considered as a part of the purchase price.

lees. It would place the lessee in the highly advantageous position of standing by with the obligation merely to pay rent out of the production from the property and then suddenly, when finding that profitable returns had ensued, announcing his ownership of a large proportion of the title, by the execution of a piece of paper. It cannot be surmised that the parties intended the contract to possess this unfair result.

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## II.

The appellant's brief fails to recognize the elementary rule that an appellate court will not substitute its own interpretation of an agreement for that of the trial court, where the latter appears logical and reasonable.

Even if the appellant's suggested interpretation of the agreement were plausible, it fails to establish a ground for the reversal of the order. The rule is well settled that a court of review will not substitute its own interpretation of a contract for the one adopted in the trial Court, even though the suggested new meaning be equally tenable with that adopted in the trial Court. This is but a specific application of the rule that the burden is on an appellant to establish error.

Extending to the appellant's contention undoubtedly more credit than it deserves, the most that possibly could be said of it is that it offers a construction of the contract "equally tenable" with that taken in the trial Court. Even if this be true, no ground for re-

versal appears, by reason of the rule we have stated. The doctrine has been announced on many occasions.

As the Court stated in

*Kautz v. Zurich Gen. Acc. & Liab. Ins. Co.*, 212 Cal. 576, 582:

“The construction given the instrument by the trial court appears to be consistent with the true intent of the parties and where that is the case the appellate court will not substitute another interpretation though it seem equally tenable.”<sup>2</sup>

*Ruffenach v. Peoples Trust Co.* (Pa. 1935), 178 Atl. 668:

“It would serve no useful purpose to extend in detail the evidence or reasoning of the court below in the interpretation of the agreement. When the sole question is the proper interpretation of an agreement \* \* \* this court will not disturb such interpretation<sup>3</sup> as controlling the rights and obligations of the parties, unless the parties have by their acts interpreted the agreement differently.”<sup>4</sup>

In accord:

*Serviss v. Jones*, 133 Cal. App. 640, 643;  
*Farmers and Merchants National Bank v. Bailie*, 138 Cal. App. 143, 149 (middle);  
*Hale v. Harbor Petroleum Corp.*, 139 Cal. App. 455, 462.

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<sup>2</sup>Emphasis ours.

<sup>3</sup>Referring to the interpretation announced by the trial court.

<sup>4</sup>We shall presently observe that the parties here interpreted the contract in accord with the meaning of it determined upon in the lower court.

In accord:

*Payne v. Pathe Studios Inc.*, 6 Cal. App. (2d) 136, 140 (middle);

*Melvin v. Berendsen*, 7 Cal App. (2d) 389, 391 (middle);

*Swerdfeger v. United Acceptance Corp.*, 9 Cal. App. (2d) 590, 593 (bottom).

As heretofore stated, we think the appellants suggested meaning of the contract a highly unreasonable one. However, it is not necessary, under the application of the rule we have set forth, that appellees establish infirmities in the appellant's offered construction. That such a burden does not rest upon an appellee is well stated in

*Whepley Oil Company v. Associated Oil Company*, 6 Cal. App. (2d) 94, 101 (middle):

"We are not prepared to declare that the construction for which appellant contends is an unreasonable construction. Equally unprepared are we to declare that the interpretation drawn by the trial court is unreasonable or untenable or so clearly inconsistent with the intent of the parties as disclosed by their language that we must substitute therefor the interpretation for which appellant contends. In such a situation, it is settled that a reviewing court is not justified in disturbing the construction adopted by the trial court." (Citing authorities)

## III.

The record demonstrates that by the practical construction taken by the parties themselves the contract of lease had the meaning given to it by the lower court.

The attempted exercise of the option, unaccompanied by any cash, occurred in May of 1937 (Tr. p. 26). The appellant's predecessor in interest was immediately advised of the ineffectiveness of the so-called notice, by reason of the failure to pay the ten thousand dollars. (Tr. pp. 26 to 28).

The petition discloses that, continuously thereafter, "royalties", in the language of the petition (Tr. p. 8), were paid until August 28, 1939. These payments were made to such extent that over-payments are now claimed upon the theory that the attempted exercise of the option was valid.

It is manifest that the lessee appreciated the soundness of the position bringing about the rejection of the attempted exercise of the option and thereafter acquiesced in the interpretation of the contract embodied in the letter of rejection. (Tr. pp. 26 to 28).

17 C. J. S. 755, Sec. 325:

"Where the parties to a contract have given it a practical construction by their conduct, as by acts in partial performance, such construction may be considered by the court in construing the contract, determining its meaning, and ascertaining the mutual intention of the parties at the time of contracting; it is entitled to great, if not controlling, weight in determining the proper interpretation of the contract and it will generally be adopted by the court.

“\* \* \* the court may and usually will adopt a construction placed on the contract by the parties where it is within the purview of, and is not inconsistent with, the language thereof, even though the contract may be susceptible of another construction.”

In

*Chick v. MacBain* (Va. 1931), 160 S. E. 214,

it was held that a failure to protest against the denial of an asserted right under the contract was one of the most effective methods of reaching a practical construction of the contract by the parties themselves.

The following cases present analogous instances, where the construction of the instrument by the parties thereto has been announced by the courts as the most reliable method of disclosing the true and intended meaning of the contract.

*Lemm v. Stillwater Land & Cattle Co.*, 217 Cal. 474, 481;

*King v. Moore*, 220 Cal. 449, 457.

The case at bar is an ideal one for the application of the rule of practical construction. The lessee continued making royalty payments, as such, with full knowledge that its nebulous claim, on the meaning of the contract, was rejected. The payments continued for twenty seven months, with no step taken to assert the option privilege. The return to the appellant's abandoned theory results in claims of so-called overpayments. It is manifest that the parties mutually recognized that the payments continued to be rental, as designated in the first portion of the lease.



## IV.

The rule requiring conditions precedent to the valid exercise of an option is a salutary one and is to be applied in this case.

The other appellees have cited many authorities to the effect that conditions precedent relating to the exercise of an option must be fully performed. It is unnecessary to enlarge upon those citations.

No advantage has been taken of the appellant or his predecessor in interest. Full information was given as to the reason for the rejection of the so-called notice. Not a step was taken to perfect the option right in the manner called for by the contract. Payments continued to be made in a manner consistent only with the continued relationship of landlord and tenant.

We therefore submit that the provisions of the contract speak for themselves in sustaining the position of the trial judge and that even were the contract to possess the ambiguities ascribed to it by the appellant, the other grounds herein asserted are amply sufficient to uphold the ruling of the trial court.

## V.

The appellant has failed to produce a record sufficient for the ascertainment of error.

It is elementary that regardless of the particular ground designated in the opinion and decision of the lower Court, the order is to be affirmed if sustainable on any ground.

*Chabot v. Tucker*, 39 Cal. 434, 435 (bottom);  
*Difani v. Riverside County Oil Co.*, 201 Cal.  
210, 217.

It affirmatively appears from the record (Tr. top of p. 47) that various grounds were interposed in support of a motion to dismiss. The appellant's brief reviews only the one ground—the one discussed in the trial Court's opinion. The appellant fails to show that the order of the trial Court is not sustainable upon any of the grounds of motion. Under the doctrine that the burden is on the appellant to show error, the appellant's brief must be considered wholly insufficient.

Dated: March 5, 1943.

Respectfully submitted,

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A. DAL. THOMSON,  
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## United States Circuit Court of Appeals

For the Ninth Circuit

JAMES P. HART, Trustee of International Mining & Milling Company (a corporation), Debtor and Mount Gaines Mining Company (a corporation), Debtor,  
*Appellant,*

VS.

CALIFORNIA PACIFIC TITLE AND TRUST COMPANY (a corporation), TITLE INSURANCE AND GUARANTY COMPANY (a corporation), HUMPHREY ESTATES, INC. (a corporation), HARRY LEE JONES, ARTHUR J. EDWARDS, D. R. GUSTAVESON, JAMES S. HAZEN, PERSIS E. HAZEN, BYRON HALVERSON and JOSEPH J. MUELLER,

*Appellees.*

BRIEF FOR APPELLEES,  
CALIFORNIA PACIFIC TITLE & TRUST COMPANY  
(A CORPORATION), AND  
TITLE INSURANCE AND GUARANTY COMPANY  
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*California Pacific Title & Trust Company and  
Title Insurance and Guaranty Company.*

FILED

MAR 8 - 1943

PAUL P. O'BRIEN,  
CLERK



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No. 10,333

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

---

JAMES P. HART, Trustee of International Mining & Milling Company (a corporation), Debtor and Mount Gaines Mining Company (a corporation), Debtor,  
*Appellant,*

vs.

CALIFORNIA PACIFIC TITLE AND TRUST COMPANY (a corporation), TITLE INSURANCE AND GUARANTY COMPANY (a corporation), HUMPHREY ESTATES, INC. (a corporation), HARRY LEE JONES, ARTHUR J. EDWARDS, D. R. GUSTAVESON, JAMES S. HAZEN, PERSIS E. HAZEN, BYRON HALVERSON and JOSEPH J. MUELLER,

*Appellees.*

**BRIEF FOR APPELLEES,  
CALIFORNIA PACIFIC TITLE & TRUST COMPANY  
(A CORPORATION), AND  
TITLE INSURANCE AND GUARANTY COMPANY  
(A CORPORATION).**

**STATEMENT OF PLEADINGS AND FACTS  
IN REGARD TO JURISDICTION.**

The petition of James P. Hart, as trustee of International Mining and Milling Company, and of Mount Gaines Mining Company, corporations in reorganization under Chapter X of the Bankruptcy Act, was filed March 2, 1942, in the reorganization proceedings then pending in the District Court of the United States, for the District of Nevada. An order to show cause was issued thereon directing the California Pacific Title & Trust Company, Title Insurance and Guaranty Company, and others to appear and show cause why the relief sought should not be granted. Primarily, the relief prayed for in the petition was the following:

1. That the court determine that debtor, Mount Gaines Mining Company, was the owner of certain real property (mining claims) situated in the County of Mariposa, State of California, and further that a judgment be entered directing certain appellees to convey title thereto to the Mount Gaines Mining Company by way of specific performance of an alleged option claimed to have been exercised.

2. That the court render a money judgment in favor of Mount Gaines Mining Company against some or all of the appellees for certain monies, which said monies were alleged to have been paid by Mount Gaines Mining Company to certain respondents as "rental" or "royalty" upon certain mining claims, and which were alleged to have accrued over a period of time when Mount



Gaines Mining Company was the alleged owner of these mining claims.

To this petition, appellee California Pacific Title & Trust Company, *appearing specially and solely for the purpose of its motion*, moved the court as follows:

1. To vacate the order of this court made on March 2, 1942, in so far as it directs service of a copy thereof and of the petition referred to therein upon this respondent and to quash the service thereof upon this respondent on the ground that this respondent is a corporation, organized under the laws of California, and was not and is not subject to service of process within the District of Nevada, and on the ground that this respondent has not been properly served with process in this action nor been served with process in the District of Nevada \* \* \*

2. To dismiss the petition dated February 28, 1942, filed in the above proceedings by James P. Hart, petitioner, on March 2, 1942, and the proceedings based thereon as to this respondent on the ground that this court has no jurisdiction in this proceeding to entertain said petition as to this respondent nor in this proceeding to grant any of the relief prayed for in said petition as against this respondent, and on the ground that said petition fails to state a claim upon which relief can be granted against this respondent in this proceeding \* \* \*

3. To dismiss said petition and the proceedings based thereon on the ground that said petition fails to state a claim upon which any relief can be granted against this respondent.

(Tr. pp. 37-38.)

The affidavit of Wm. H. Smith, Jr., filed on behalf of appellee California Pacific Title & Trust Company (Tr. pp. 39-41), shows that appellee California Pacific Title & Trust Company is a California corporation, has never transacted business in or been a resident of the State of Nevada, that service of the order to show cause was effected in the City of San Francisco, State of California, and that said appellee did not consent to the jurisdiction of the court either over itself or over the subject matter of the action.

The affidavit of Harry Geballe, filed on behalf of appellee California Pacific Title & Trust Company (Tr. pp. 41-43), shows that the only interest that appellee California Pacific Title & Trust Company ever had in and to the mining claims was that of trustee under and pursuant to an appointment made by the Superior Court of the State of California, in and for the County of Mariposa, on February 21, 1936; that thereafter and on September 3, 1940, California Pacific Title & Trust Company resigned as such trustee and conveyed the mining claims to appellee Title Insurance and Guaranty Company, the duly appointed successor trustee, by deed dated September 6, 1940, all pursuant to a decree of said court dated September 3, 1940. That since September 6, 1940, California Pacific Title & Trust Company has had no interest in or title to the mining claims as trustee or otherwise, and claims none.

Appellee Title Insurance and Guaranty Company filed a motion similar to that of appellee California Pacific Title & Trust Company. (Tr. pp. 29-30.) This

was accompanied by supporting affidavits in all respects similar to those filed by California Pacific Title & Trust Company, except that they show that appellee Title Insurance and Guaranty Company has held title as trustee to the mining claims since September 6, 1940, pursuant to the order of the court. (Tr. pp. 31-36.)

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### STATEMENT OF THE CASE.

Appellant's statement of the facts of the case (Appellant's Brief, pp. 7-13) is substantially correct as far as it goes. It fails in a material respect, however, to fully and properly state the questions involved in this appeal. Appellant states in his brief (p. 12) that "the decision of the Court in dismissing the case was made solely upon its opinion that the option had not been exercised for failure to make the \$10,000.00 payment".

This conclusion fails to recognize the import of appellees' motions, each of which asks, among other things, that the petition and the proceedings based thereon be dismissed on the ground

"\* \* \* that this court has no jurisdiction in this proceeding to entertain said petition as to this respondent nor in this proceeding to grant any of the relief prayed for in said petition as to this respondent, \* \* \*

"\* \* \* that said petition fails to state a claim upon which any relief can be granted against this respondent."

(Tr. pp. 37-38, 29-30.)

And the order of the court, after reciting that “motions to dismiss of respondents, *based on jurisdictional and other grounds*, having heretofore been heard, submitted on briefs and by the Court taken under advisement” thereupon ordered “that the motions to dismiss are granted without prejudice”. (Tr. p. 45.) It is true that the opinion of the court deals only with a consideration of the attempted exercise of the option to purchase, but it is evident from the order itself that such order granted all the motions then before the court which sought a dismissal.

The questions involved in this appeal are therefore:

1. Was jurisdiction acquired over appellees California Pacific Title & Trust Company and Title Insurance and Guaranty Company?

2. Did the court have jurisdiction to determine the claims asserted against said appellees in a summary proceeding?

3. Did the petition state facts sufficient to constitute a claim upon which any relief could be granted?

---

### ARGUMENT.

**THE ORDER GRANTING MOTIONS TO DISMISS PROCEEDINGS AS TO THESE APPELLEES WAS PROPER FOR NO JURISDICTION WAS ACQUIRED OVER THEM.**

The petition asked for, primarily,

1. A determination of title to mining claims located in the State of California.

2. A money judgment.

It appears from the affidavit filed on behalf of appellee California Pacific Title & Trust Company (Tr. pp. 41-43) that said appellee held no title to or possession of the mining claims since the institution of these proceedings, as trustee or otherwise, nor does it claim any, which facts are not disputed.

The only claim, therefore, asserted against appellee California Pacific Title & Trust Company was *for monies*, alleged to have been paid by debtor to said appellee as trustee, and which consisted of rental and royalty payments due under a lease of the mining claims. It does not appear that appellee California Pacific Title & Trust Company held any such monies, as trustee or otherwise, belonging to said Mount Gaines Mining Company, but on the contrary the petition of appellant acknowledges that the monies paid to said appellee during its trusteeship were distributed to the respective beneficiaries of the trust (Debtor's Petition, Tr. p. 9), and the affidavit of Harry Geballe filed on behalf of said appellee (Tr. pp. 41-43) shows that said appellee was duly discharged from its trust on September 3, 1940, being prior to the institution of these proceedings.

The proceedings were summary in nature, initiated in a bankruptcy court in the judicial district of Nevada. Appellee California Pacific Title & Trust Company was a nonresident of this district, had never transacted business in the State of Nevada, and was not served therein. The action against said appellee was purely *in personam*, namely to obtain a money judgment. Said appellee did not consent to jurisdic-

tion over its person. It is submitted that under these facts the court acquired no jurisdiction over said appellee California Pacific Title & Trust Company; that such lack of jurisdiction is clearly established by the cases of *United States et al. v. Tacoma Oriental S. S. Co.* (C.C.A. 9th, 1936), 86 Fed. (2d) 363; *Bovay et al. v. H. M. Byllesby & Co. et al.* (C.C.A. 5th, 1937), 88 Fed. (2d) 990, and *Thompson v. Terminal Shares, Inc.* (C.C.A. 8th, 1939), 104 Fed. (2d) 1, Cert. Denied, 60 Sup. Ct. 100.

The case of *United States, et al. v. Tacoma Oriental S. S. Co.* (C.C.A. 9th, 1936), 86 Fed. (2d) 363, is particularly significant because of its similarity to the instant case. Debtor, in proceedings brought in the District Court in the State of Washington under Section 77B of the Bankruptcy Act, filed a petition alleging that the United States was indebted to it in certain sums under mail contracts, and that certain officers of the United States unlawfully withheld payment. An order to show cause was issued directing the United States and the officers to appear and show cause why payment should not be made.

The officers objected to the jurisdiction of the court, and moved that the petition be dismissed on the ground that the court had no jurisdiction over their persons, service having been made outside the territorial limits of the district.

The court recognized that Congress may, if it sees fit, authorize civil process outside the federal district wherein the court is situated. The question was whether such authorization had been given under the

provisions of the Bankruptcy Act. The court stated the question thus:

“\* \* \* whether the lower court had jurisdiction to issue process to appellant in another district under the facts of the case, pursuant to the provisions that ‘the court \* \* \* shall \* \* \* have exclusive jurisdiction of the debtor and its property wherever located’.”

The court pointed out that the officers were not holding *property* belonging to the debtor, that the action was one “purely in personam” and therefore under the circumstances no jurisdiction was obtained over the persons of the individual appellants. The court set aside the service as to them. It said:

“We believe that the act giving exclusive jurisdiction of the lower court over debtor’s property wherever located simply means that the *res* (the debtor’s property) is to be considered solely under the jurisdiction of the lower court. Any wrongful invasion, interference, or disposition of that *res* is to be dealt with solely by the lower court. Jurisdiction over a person outside the lower court’s jurisdiction, is given to the lower court, only if such person is in some manner invading, interfering, or disposing of the debtor’s *res*, and then only to the extent of preventing or forestalling the invasion, interference or disposition of such *res*. *The act gives no jurisdiction to the trial court to issue its process outside its district in proceedings purely in personam, in which no protection of the debtor’s res is involved.*” (Emphasis added.)

In the concurring opinion of Denman, J., it is said, page 370:

“Certainly here is no warrant for the extra-territorial service of the court’s process in suits at law purely in personam.”

In *Bovay, et al. v. H. M. Byllesby & Co., et al.* (C.C.A. 5th, 1937), 88 Fed. (2d) 990, a plenary suit was filed in corporate reorganization proceedings under Section 77B of the Bankruptcy Act against certain defendants who resided outside the district. It asked for monies alleged to have been fraudulently diverted from the treasury of the debtor. Defendants moved to dismiss the suit and to quash service as to them, claiming that they were nonresidents of the district and were served outside the territorial limits thereof. The sole question before the court was stated as follows:

“Does such jurisdiction extend beyond the territory of the district in a suit in personam by the trustee appointed in a reorganization proceeding to require an accounting by defendants not inhabitants of the district, and not found therein, for monies alleged to have been fraudulently diverted from the treasury of the corporation \* \* \*?”

The court held that the effort to take jurisdiction therein was a nullity and granted motions to quash service and to dismiss the suit. It said:

“This is not a suit to recover property admittedly owned by the bridge company \* \* \* It is a suit upon a chose in action, and seeks a judicial determination of the validity of an alleged indebtedness of appellees for monies due appellants as trustees of the debtor. It is conceded



that a chose in action which belongs to the debtor is an intangible asset subject to the control of the bankruptcy court, but the title to the thing is not sufficient to confer jurisdiction over the person of the defendants owing the money who reside in another district and are beyond the ordinary processes of the court.”

In *Thompson v. Terminal Shares Inc.* (C.C.A. 8th, 1939), 104 Fed. (2d) 1, Cert. Denied, 60 S. Ct. 100, an ancillary suit was brought by the trustee of Missouri Pacific Railroad Company, appointed in proceedings under Section 77 of the Bankruptcy Act. It was brought in the United States District Court for the Eastern District of Missouri. The bill sought to recover certain money alleged to have been paid by the debtor under certain contracts for the purchase of corporate stock, which contracts, it is alleged, were fraudulent and *ultra vires*, and asked that a lien be imposed upon the shares of the stock and that they be sold to satisfy the lien. The defendants were not served in the Eastern District of Missouri, and the property upon which the lien was claimed was not within said district. Defendants appeared specially and moved to set aside service, which motion was granted.

The court pointed out that the provisions of Section 77 and of Section 77B of the Bankruptcy Act were identical, so far as they covered the jurisdiction of the court, except that Section 77 provided that process of the court shall extend to and be valid when served in any judicial district.

The court sustained the ruling of the lower court, pointing out that even though the court had jurisdiction over the debtor and his property wherever located, and even though the act provided that process of the court shall extend to and be valid when served in any judicial district, nevertheless no jurisdiction was given to entertain such a suit as this against non-residents of the district not served therein.

The court said:

“To sustain the lower court’s jurisdiction of this suit would do violence to the general policy of Congress that persons shall not be subjected to civil suits except in the district of which they are inhabitants. (Citing cases.) The language used by Congress in Section 77, in conferring jurisdiction upon the courts of bankruptcy does not, in our opinion, indicate any intention to abandon that policy with respect to such suits as this.”

Also:

“Unquestionably, the claim of the trustees of the Missouri Pacific Railroad Company for an accounting and for the enforcement of the equitable lien asserted is an asset of the trust estate and as such is under the jurisdiction and control of the court of bankruptcy \* \* \* The power of that court to preserve and safeguard the claim of the trustee does not carry with it the power to adjudicate its controversy with adverse and non-consenting defendants.”

Appellee Title Insurance and Guaranty Company likewise was not a resident of the judicial district of Nevada, and was not served therein. It is equally

clear that the court had no jurisdiction over it to render a money judgment.

As to it, however, appellant asks the court in a summary proceeding to compel it, as trustee, to execute a deed conveying the mining claims to debtor Mount Gaines Mining Company by way of specific performance of an option to purchase alleged to have been exercised. But an action for specific performance is also one *in personam* over which jurisdiction of the person must be acquired. (*In re Avondale Farms Dairy, Inc.* (D.C., Pa., 1938), 25 Fed. Supp. 605.) The only possible basis upon which jurisdiction could be assumed by the court (no valid personal service having been had upon appellee Title Insurance and Guaranty Company, and the property being outside the territorial jurisdiction of the court) would be by reason of the fact that the debtor, Mount Gaines Mining Company, as lessee, was in physical possession of the property. It is conceded that upon a proper showing a bankruptcy court in proceedings under Chapter X of the Bankruptcy Act may make such orders as are necessary to conserve the assets of the debtor even though such assets are located outside the territorial jurisdiction of the court and even though the persons to whom the order is directed have not been so served with process that a personal judgment could be rendered against them.

However in the absence of a showing that there is a *threatened interference with the debtor's possession* and in the absence of a showing that the *assumption of jurisdiction is necessary to the completion of the*

*reorganization proceedings*, it is respectfully submitted that there is nothing in the Bankruptcy Act nor in the cases construing the same nor in the recognized texts on the subject which would warrant the conclusion that the act gives to the Federal District Court the power to direct its process outside the territorial jurisdiction of the court, or the jurisdiction to try title to property located outside thereof simply because the debtor is in possession as lessee.

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**ASSUMING THAT VALID SERVICE HAD BEEN OBTAINED UPON THESE APPELLEES, STILL THE ORDER DISMISSING THE PROCEEDINGS WAS PROPER FOR THE COURT HAD NO JURISDICTION IN A SUMMARY PROCEEDING TO HEAR AND DETERMINE THE CLAIMS ASSERTED AGAINST THEM.**

The petition asks for a money judgment. It does not show that the monies claimed are in the possession of or under the control of these appellees, but on the contrary it acknowledges that the monies alleged to have been paid to them as trustees have been distributed to the beneficiaries of the trust. That under such circumstances, the court has no jurisdiction to grant relief by summary proceedings as to adverse claimants is clearly established by the case of *Warder v. Brady* (C.C.A. 4th, 1940), 115 Fed. (2d) 89. In this case, one Warder had been appointed special receiver by a state court for the benefit of certain bondholders of debtor corporation. Reorganization proceedings were instituted on behalf of the debtor, at which time Warder had certain funds in his hands in his capacity as receiver. The trustee in the reorganization proceed-

ings filed a petition for an order directing the receiver to turn over these funds to him. The receiver was validly served, and appeared specially and filed an answer in which he claimed title to the funds for the benefit of the bondholders. The matter was heard summarily upon the petition and answer, and a turn-over order was made.

The order was reversed in part upon the ground that the court had no jurisdiction in a summary proceeding to order the monies paid over to the debtor, and that the fund could be sought only in a plenary suit.

The court holds that assuming that the court wherein the reorganization proceedings were pending might have had jurisdiction in a *plenary* action to recover this fund, in view of the inapplicability of Section 23 of the Bankruptcy Act to proceedings under Chapter X, such an action would nevertheless have to be a plenary and not a summary suit.

The court said, after discussing the provisions of the Bankruptcy Act on jurisdiction:

“It does not follow, however, that the jurisdiction of the bankruptcy court over suits against an adverse claimant may be summarily exercised. The statute does not so provide; and under the well established procedural rule of the ordinary bankruptcy court, as we have seen, suits by a trustee to recover property from an adverse claimant in possession must take the form of a plenary action. This is especially true when the title to property is in dispute.”

Furthermore, as to the question of the powers of this court to determine adverse claims of title to real property situated in the State of California, any determination must necessarily be based upon a construction of the laws of the state wherein the land lies. Since the decisions of the state courts are supreme as to the interpretation and construction of its laws in this respect, it was held in *Thompson v. Magnolia Petroleum Co.*, 309 U. S. 478, 60 S. Ct. 628, that such questions relating to title should properly be tried in the courts where the land lies.

Regarding jurisdiction of a bankruptcy court in reorganization proceedings when adverse claims are made, Thomas K. Finletter in his work on *The Law of Bankruptcy Reorganization*, 1939 Ed., page 163, says:

“There may be an allegation by an outside party, not merely that he has a lien on property in the possession of the reorganization court, but that he owns the property himself and that therefore the asset in question is not a part of the estate which is being administered. If the actual possession of the property had been in the claimant he would have been entitled to have his rights determined in a plenary suit. The asset would not have been considered as a part of the estate. *There is no reason in principle why the ownership would not be decided in the same way when the physical possession happens to be in the debtor. The asset is no more a definite part of the bankrupt estate than when it is in the possession of the claimant. The dicta, but not the decisions, are to the contrary and authorize the adjudication of complete ownership in a summary*

*proceeding when the disputed property is in the debtor's actual possession, but it is believed that in a contested case an adverse claimant would be entitled to a plenary hearing.'*

As further supporting the views hereinabove expressed, appellees cite the following authorities:

*In re Standard Gas & Electric Co.* (C.C.A. 3rd, 1941), 119 Fed. (2d) 658;

*In re Avondale Farms Dairy, Inc.* (D.C., Pa. 1938), 25 Fed. Supp. 605;

*In re Greater Pythian Temple Association of New York* (D.C., N.Y., 1937), 19 Fed. Supp. 762;

*In re Roberts Mining & Milling Co.* (D.C., Nev., 1936), 16 Fed. Supp. 424;

*Gerdes on Corporate Reorganization*, Sec. 868.

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THE ORDER GRANTING THE MOTION DISMISSING THE PROCEEDINGS WAS PROPER FOR THE REASON THAT THE PETITION DID NOT STATE FACTS SUFFICIENT TO CONSTITUTE A CLAIM UPON WHICH ANY RELIEF COULD BE GRANTED.

Any and all claims asserted in appellant's petition are predicated solely upon his contention that debtor exercised its option to purchase the mining claims. Appellant contends in his brief that the option was exercised upon the giving of written notice, and that immediately such notice was given, a mutually binding contract of sale existed.

The lease states in reference to the exercise of the option: “\$10,000.00 to be paid in cash at the time of

*notice to the first party of the exercising of said option to purchase."* This language unmistakably contemplates *at least* two things, namely (a) the payment of \$10,000.00 cash, and (b) notice. There is no justification for assuming that the giving of notice was more important than the payment of the cash. The petition does not show that the required \$10,000.00 cash was paid or tendered at the time notice of exercising the option was given, *or at any subsequent time*. Mining option contracts are construed strictly against the optionee. Time was expressly made the essence of this option agreement; however, independently of stipulation, it is uniformly held that where mines or mining properties are the subject of contract, time is of the essence.

*Fry, Specific Performance*, 6th Ed., Sec. 1082;

*Lindley on Mines*, 3rd Ed., Sec. 859;

*Snider v. Yarbrough*, 43 Mont. 203, 115 Pac.

411.

In *Lindley's* work on Mines, 3rd Ed., Sec. 859, it is stated:

"In respect to mineral property, it has been said that it requires, and of all properties perhaps the most, the parties interested in it to be vigilant and active in asserting their rights."

But appellant claims that the \$10,000.00 cash payment was made by the "application" of rental and royalties previously paid. The option provides that in the event it is exercised such rental and royalties may be applied "from time to time \* \* \* upon the



installment of purchase price next becoming due and payable *after the first installment mentioned herein*". The only provision for payment of the "first installment" is by "*cash* at the time of notice to the first party of the exercising of said option to purchase".

The absurdity of holding that previously paid rentals and royalties could be applied is demonstrated by the fact that under such a construction no advantage would be gained by optionee in exercising the option privilege until enough rents and royalties had been paid in to cover the entire purchase price. He could then, under such theory, claim the property.

The only question involved is whether or not the lease provided that the option to purchase could be exercised at any time by the giving of a notice and a demand that royalties previously paid be deemed to constitute the initial payment of \$10,000.00. Little can be gained by laboring the argument that the lease simply does not so provide.

The provision authorizing the application of royalty payments upon the purchase price is expressly limited to those installments of the purchase price "becoming due and payable after the first installment" which first installment in turn is expressly required to be "paid in cash" in one sum of \$10,000.00. Little can be added to the opinion of the court below on the point. Clearly the allegations of the petition do not state facts showing an exercise of the option in the manner required by the express terms of the lease set forth in the petition.

It is respectfully submitted that the order of the District Court granting the motions to dismiss and dismissing the proceedings should be confirmed.

Dated, San Francisco,  
March 8, 1943.

Respectfully submitted,  
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*California Pacific Title & Trust Company and*  
*Title Insurance and Guaranty Company.*

No. 10,333

IN THE  
**United States Circuit Court of Appeals**  
For the Ninth Circuit

JAMES P. HART, Trustee of International  
Mining & Milling Company (a corpo-  
ration), Debtor and Mount Gaines Min-  
ing Company (a corporation), Debtor,  
*Appellant,*

VS.

CALIFORNIA PACIFIC TITLE AND TRUST  
COMPANY (a corporation), TITLE IN-  
SURANCE AND GUARANTY COMPANY (a  
corporation); HUMPHREY ESTATES, INC.  
(a corporation), HARRY LEE JONES,  
ARTHUR J. EDWARDS, D. R. GUSTAVE-  
SON, JAMES S. HAZEN, PERSIS E. HAZEN,  
BYRON HALVERSON and JOSEPH J.  
MUELLER,

*Appellees.*

**APPELLANT'S REPLY BRIEF.**

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**FILED**

MAR 30 1943



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---

JAMES P. HART, Trustee of International  
Mining & Milling Company (a corpo-  
ration), Debtor and Mount Gaines Min-  
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corporation), HUMPHREY ESTATES, INC.  
(a corporation), HARRY LEE JONES,  
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SON, JAMES S. HAZEN, PERSIS E. HAZEN,  
BYRON HALVERSON and JOSEPH J.  
MUELLER,

*Appellees.*

**APPELLANT'S REPLY BRIEF.**

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The brief of the respondents, California Pacific Title & Trust Company and Title Insurance and Guaranty Company, is devoted, at least most of it, to the jurisdiction of the lower Court to hear and determine the matters, and brought this question into the

hearing before the Appellate Court without any regard to what the lower Court really determined.

The California Pacific Title & Trust Company takes the position that the petitioner is only seeking a money judgment against the California Pacific Title & Trust Company for monies alleged to have been paid it. That it had dispersed the money and conveyed the legal title to the property to the Title Insurance & Guaranty Company. That since the conveyance it ceased to have any interest in the matter, and that by its actions it had discharged itself from any liability.

The petition specifically sets forth that demand was made upon the California Pacific Title & Trust Company to apply the rentals and royalties paid in prior to May 25, 1937, that three-fourths of the amount being the sum of \$13,063.86 (Tr. page 7), and it was the California Pacific Title & Trust Company that refused to do so. (Tr. page 26.) Further, the California Pacific Title & Trust Company claims that on September 6, 1940, the California Pacific Title & Trust Company conveyed to the Title Insurance & Guaranty Company all of the mining claims in question in this proceeding. We have from the record that it was the California Pacific Title & Trust Company that refused to apply the royalties, while it affirmatively appears that the full \$50,000.00 mentioned in the option had been paid on August 28, 1939. The California Pacific Title & Trust Company held the title and held it until a year after that date. (Affidavit of Harry Geballe, Tr. page 41.) It also appears that



when this proceeding was commenced, March 2, 1942, the Title Insurance & Guaranty Company was the holder of the legal title. (Affidavit of A. V. Salerno, Tr. page 33.)

Both of these corporations are called in to account for their actions. It is the act of the California Pacific Title & Trust Company in refusing to apply the monies upon the purchase price that was the cause of the injury and the Title Insurance & Guaranty Company is now the present holder of the legal title to the mining claims and it is this corporation, or perhaps both corporations, that would be compelled to execute a conveyance if the Mount Gaines Mining Company should prevail in this proceeding. Both of these corporations are not only proper but necessary parties in this proceeding.

It also appears from the petition that from the 1st day of December, 1934, the Mount Gaines Mining Company entered into the possession of the mining claims and ever since that time has been and now is in the full and exclusive possession of said mining claims. (Tr. pages 5 and 6.)

It is perfectly clear from the petition that this proceeding is a controversy over property in the possession and claimed to be owned by the Mount Gaines Mining Company, and was in the possession of the mining company since December 1, 1934. Both of the Trust Companies are necessary parties for the determination of the right of the Mount Gaines Mining Company to the possession and ownership of the property.

## JURISDICTION.

The jurisdiction of the Bankruptcy Court in reorganization proceedings, where title to property in the possession of the bankrupt is questioned, is exclusive and it has been repeatedly held that the Court has power by virtue of the possession of the property at the time of filing of the petition to determine all questions concerning such property.

“But the exclusive jurisdiction acquired by the bankruptcy court through taking possession of the interurban railway under claim of title, was not limited to the prevention of interference with the use of the land. Compare *Chicago Bd. of Trade v. Johnson*, 264 U. S. 1, 11, 68 L. ed. 533, 536, 44 S. Ct. 232, 2 Am. Bankr. Rep. (N.S.) 528; *Taubel-Scott-Kitzmiller Co. v. Fox*, 264 U. S. 426, 433, 68 L. ed. 770, 774, 44 S. Ct. 396. The jurisdiction extends also to the adjudication of questions respecting the title. *Whit v. Schloerb*, 178 U. S. 542, 44 L. ed. 1183, 20 S. Ct. 1007, 4 Am. Bankr. Rep. 178; *Re Eppstein* (C.C.A. 8th), 156 Fed. 42, 17 L. R. A. (N.S.) 465, 19 Am. Bankr. Rep. 89. Compare *Wabash R. Co. v. Adelbert College*, 208 U. S. 38, 54, 52 L. ed. 379, 386, 28 S. Ct. 182; *Security Mortg. Co. v. Powers*, 278 U. S. 149, 153, 73 L. ed. 236, 239, 49 S. Ct. 84, 13 Am. Bankr. Rep. (N.S.) 86.”

*Ex parte Baldwin*, 291 U. S., p. 616, 78 L. ed., p. 1023;

*Thompson v. Magnolia Petroleum Co.*, 309 U. S., pp. 482, 483, 84 L. ed. 880.

“A court of bankruptcy has jurisdiction to ‘bring in and substitute additional persons or parties in proceedings in bankruptcy when necessary for

the complete determination of a matter in controversy; (and to) cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto', with exceptions not here material. This jurisdiction of the bankruptcy court extends to the determination of controversies relating to all property in the debtor's physical possession or in the hands of the debtor's agent at the time of the filing of a petition in bankruptcy. In every case the bankruptcy court has power, in the first instance, to determine whether it has that actual or constructive possession which is essential to its jurisdiction to proceed."

*Harris v. Avery Brundage Co.*, 83 L. ed. 103,  
305 U. S. 161-163;

*Mt. Forest Fur Farms of America*, 122 F. (2d)  
232.

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### RECOVERY OF THE OVERPAYMENTS.

The claim for the overpayment of the money to the two Trustees is based upon the claim that on August 28, 1939, the full amount of the purchase price of \$50,000.00 for three-fourths interest in the mining claims had been paid. The right to the recovery of that money would naturally fail if the action for the title should fail so that the claim for money is incidental and based upon the claim of the Trustee that the full purchase price of the three-fourths interest had been paid August 28, 1939, and that the Mount Gaines Mining Company was the owner of the three-fourths interest in the claims.

The contention that the Trustee does not claim anything but money from the California Pacific Title & Trust Company is not supported by the petition. It asks that the Trustees execute and deliver a deed to the three-fourths interest. California Pacific Title and Trust Company signed Exhibit "C" refusing to apply three-fourths of the royalty payments upon the purchase price and the California Pacific Title & Trust Company held the property thereafter regardless of the claim to the title by the Mount Gaines Mining Company. (Ex. C, Tr. page 26.)

Further, the same Exhibit "C" affirmatively shows that in refusing to apply the money it was not instructed by all of the beneficiaries to take the action it did take. It states:

"Under the provisions of such judgment, the action of the undersigned as such Trustee is to be determined by the united instructions of all the Beneficiaries named therein. The undersigned has not, up to date, received the instructions from all of said Beneficiaries, but in the absence thereof and in order that the failure of the undersigned to reply to your purported election to exercise the option which you claim to have, may not be construed as in any way affecting any of the Beneficiaries of this Trust, or their rights therein, you are advised that the undersigned cannot accept your purported election to exercise your claimed option."

(Exhibit C, Tr. page 27.)

The right to this money arose by virtue of the contract to purchase the property on the part of the

Mount Gaines Mining Company and to sell the property by the owners. The payments were part of this contract and it is this contract that is now before the Court for its consideration. If this Court determines that the notice to C. F. Humphrey, Holcomb, Harry Lee Jones, and the California Pacific Title and Trust Company, dated May 25, 1937, exercised the option (Tr. page 25), then the option went out of existence and an executory contract for the sale and purchase of the mining claims came into existence and it is that contract under which it is claimed that the overpayments were made.

It is that contract under which the petitioner claims to have become the owner of three-fourths interest in the mining claims and under which it inadvertently or wrongfully made the overpayments that is to be considered. This money was the property of the Mount Gaines Mining Company when it was paid and if it was paid inadvertently or wrongfully the respondents herein never became the rightful owners of it, and this proceeding affects all of the respondents for the right that is claimed against all of them and arose out of the contract.

“There is a saying that courts of equity delight to do complete justice and not by halves. This maxim has grown out of the desire of the court completely to decide every matter involved in the litigation, so that there may be no roots of controversy left out of which other suits may spring.”

*Streets Federal Equity Practice*, Vol. 1, Section 396, p. 238.

“Not only this, the court of equity does not encourage, and sometimes will not even tolerate, the bringing of a suit to settle only a part of a controversy, where the whole may be conveniently determined in one suit. It will not allow a single cause of action to be split up into two or more branches. Thus a bill will not lie for a part of an account. The suit should cover all the matters of account.”

*Streets Federal Equity Practice*, Vol. 1, Section 397, p. 239.

The cases cited by the two corporations, California Pacific Title and Trust Company and the Title Insurance & Guaranty Company are not in point and their statement of the case is to some extent misleading.

The *United States v. Tacoma Oriental S. S. Co.*, 86 Fed. (2d), page 363, was an attempted summary proceeding to collect a debt from the United States for carrying mails to China. Congress had appropriated money but the officers of the Treasury had not paid, or refused to pay them and in speaking of it the Court makes this statement:

“When the appropriation was here made, the funds thus appropriated were not by the appropriation transferred to appellee. The funds would become the property of appellee only by application of such appropriation, or, in other words, payment to appellee. The funds appropriated, were not, therefore, property belonging to appellee. We conclude that the lower court had no jurisdiction over the persons of the individual appellants.”

That case decided that it was only a debt and it had never been paid and the money had never been in the possession of the steamship company.

In the case of *Avondale Farms Dairy, Inc.*, 25 Fed. Supp., page 605, the dairy company had sold their good will to Stein and left certain property in his possession for the consideration that Stein would sell the dairy's products in his store and make all of his purchases from the dairy company. After conducting the business for awhile, Stein refused to comply with the contract and notified the dairy company to take their fixtures away or else he would store them at the expense of the dairy company. The dairy company had filed a petition for reorganization in the District Court of the Eastern District of Pennsylvania and it immediately applied to that Court to compel Stein to perform his part of that contract. The Court, in speaking of it, states:

"2. It follows that this Court could make any order to protect the tangible property of the debtor in the possession of Stein. The real controversy however is not over the tangible property but over what counsel for the debtor describes as an intangible asset of the debtor, consisting of its good will in the business. In other words, it asserts that when it was itself conducting the business it owned in addition to the tangible assets of the store its good will. This undoubtedly is in one sense property.

"3. The claim of right which the debtor is asserting against Stein arises wholly out of his contract and what it seeks from the Court is an order upon Stein requiring him to purchase the supplies for

his store from the debtor and from no one else. This, as we have said, is the equivalent of a bill for specific performance of a contract. Stein is undoubtedly under whatever legal obligations he has incurred because of his contract and whatever the rights of the debtor are under this contract may be enforced at law or in equity.”

The case of *Bovay, et al. v. H. M. Byllesby & Co., et al.*, 88 Fed. (2d) 990, is explained in the first paragraph of the opinion:

“This is not a suit to recover property admittedly owned by the bridge company, nor one for a stay or injunction of any kind. It is a suit upon a chose in action, or choses in action, and seeks a judicial determination of the validity of an alleged indebtedness of appellees for moneys due appellants as trustees of the debtor. It is conceded that a chose in action which belongs to the debtor is an intangible asset, subject to the control of the bankruptcy court, but the title to the thing is not sufficient to confer jurisdiction over the person of the defendants owing the money who reside in another district and are beyond the ordinary processes of the court.”

This is identical with the cause of action attempted to be set out in *United States v. Tacoma Oriental S. S. Co.* in 86 Fed. and received the same kind of treatment.

The respondents in this case all assume, or make the mistake of assuming, that this is an action on the option. They seem to disregard the claims made by the appellant in his opening brief that the option was



exercised and by the exercising of that option the mining company had an agreement with the owner to purchase the property and did purchase it for \$50,000.00, and assumed a liability to pay \$50,000.00. What had been an option with an option price of \$50,000.00, until the notice was served on the trustees and the owners, then became an agreement of sale and purchase and the Mount Gaines Mining Company became the debtor to the owners for the sum of \$50,000.00 which could be enforced against it and against any property that the mining company might own including the three-fourths interest in the mines in question.

The writer of this brief does not want to reiterate matters set out in his opening brief but cannot help reiterating here, or at least traversing, some of the matters set out in the brief of the two corporations, appellees herein. There is no question but what an option is strictly construed but it could be fairly construed so as to give effect to the intention of the parties. There was a valuable consideration given for that option as appears by a most casual reading of the terms of the so-called lease. When it is remembered that the mill constructed by appellant, head frames, compressors, fixtures, machinery of all kinds used in the operation of this mine, when put upon the mine became the property of the owners of the mine and for that agreement upon the part of the Mount Gaines Mining Company, the owners expressly promised:

“It is further agreed that seventy-five per cent (75%) of the royalties and rental payments paid

under this *lease* shall be applied and credited upon the purchase price of the said three-fourth ( $\frac{3}{4}$ ) interest in said property herein provided to be sold in event the second parties exercise said option and purchase said property hereunder,”

That statement expressly states:

“the royalties and rentals paid under *this lease* shall be applied and credited,”

The lease on that three-fourths interest ceased and went out of existence when the Mount Gaines Mining Company assumed the liability to pay \$50,000.00 for the three-fourths interest and when it assumed that liability it became the owner of three-fourths of the beneficial interest of that property and the earnings thereafter. Three-fourths of it belonged to the Mount Gaines Mining Company and one-fourth belonged to the owners.

It affirmatively appears from the petition that on the 25th day of May, 1937, when the notice of the exercise of the option was served, \$17,418.48 had been paid to J. W. Humphrey and the California Pacific Title & Trust Company and three-fourths of that amount, the sum of \$13,063.86, was directed to be applied upon the purchase price. The owners refused to comply with that and demanded \$10,000.00 in cash. The lower Court in its opinion held that it was only the royalties paid after the notice of the exercise of the lease that could be applied upon the purchase price.

It is to be inferred from the option that 10% of the gross receipts of the sale of ores was to be paid to the

owners. 25% of that 10% could only be considered royalty payments; the other 75% was the money of the Mount Gaines Mining Company and was a payment upon the purchase price of the property. That 75% was not paid under the lease but was paid under the agreement to purchase and was to be applied upon the debt of \$50,000.00 owed by the Mount Gaines Mining Company to the owners.

Under the option, the optionee was not to do anything but the option contained a promise that if the Mount Gaines Mining Company would purchase the property it would apply 75% of the money paid under the lease upon the purchase price. There was no promise upon the part of the Mount Gaines Mining Company that it would or would not purchase the property. The promise to apply the rentals and royalties paid was made by the owners to the optionee and when the Mount Gaines Mining Company, by its notice of May 25, 1937, exercised the option, the trustee and the owners were in duty bound to apply three-fourths of all of the royalties or rentals theretofore paid under the lease upon the purchase price. The owners attempted to repudiate their agreement and promise and attempted to withhold \$13,063.86, for their own benefit and compel the Mount Gaines Mining Company to pay \$10,000.00 for the privilege of exercising that option.

If there is any ambiguity in that option it was the fault of the owner.

“If the terms of a promise are in any respect ambiguous or uncertain, it must be interpreted in

the sense in which the promisor believed, at the time of making it, that the promisee understood it.”

*Civil Code of California*, Section 1649.

“In cases of uncertainty not removed by the preceding rules, the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist. The promisor is presumed to be such party; except in a contract between a public officer or body, as such, and a private party, in which it is presumed that all uncertainty was caused by the private party.”

*Civil Code of California*, Section 1654.

“When the terms of an agreement have been intended in a different sense by the different parties to it, that sense is to prevail against either party in which he supposed the other understood it, and when different constructions of a provision are otherwise equally proper, that is to be taken which is most favorable to the party in whose favor the provision was made.”

*Code of Civil Procedure*, Section 1864.

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### **TIME IS OF THE ESSENCE.**

The respondents attempt to make some point of the fact that the payments required for the purchase price should have been completed on May 25, 1939 but were not completed until August 28, 1939, and assert that time is the essence of the contract.

Their position in that matter is rather inconsistent. First, they say that the option was not exercised for

the reason that \$10,000.00 had not been paid at the time of the notice to exercise the option and unless \$10,000.00 was paid they would not apply 75% of the payments made to them under the lease. If the position of the appellant herein is correct and if the lease was exercised by the written notice, the action of the owners in refusing to apply that payment was inequitable and unjust and prevented the appellant herein from making up whatever difference existed between the application of the monies paid on May 25, 1937 to May 25, 1939. When they refused to recognize the notice of May 25, 1937, exercising the option, they deprived the appellant herein the use of that property in aiding and assisting in getting sufficient funds to make the payments and compelled them to rely solely upon the returns from the mine. This was the fault of the appellees or owners of that property and they now attempt to use that piece of injustice as a means for claiming we have not complied with our contract to pay the money in the stipulated time.

Under the contention of the appellant herein when the Mount Gaines Mining Company notified the owners that it exercised the option it became indebted to the owners in the sum of \$50,000.00 and that indebtedness was evidenced by the option and by the notice of the exercise of the option. The equitable title passed out of the owners and to the Mount Gaines Mining Company in exchange for the debt and the owners were merely the trustees of the legal title and the Mount Gaines Mining Company the trustee of the purchase price. That debt was a continuing debt until it was paid and there is no agreement, or contract, or cove-

nant in the option or even in the lease that makes the failure to make any payments on time a termination of the contract and a forfeiture of the monies paid on the purchase price or if such forfeiture is asserted there is no agreement that the contract shall become null and void. The debt would still remain a debt of the Mount Gaines Mining Company.

*Hansen v. Havener*, 231 Pac., page 363;

*Pomeroy on Contracts*, Section 315;

*Boone v. Templeman*, 158 Cal., page 290;

*E. Bennett v. J. D. Hyde*, 92 Cal., page 131;

*Steele v. Branch*, 40 Cal., page 3.

“Whenever, also, the plaintiff’s delay or default in performing the terms and conditions on his part, at the time specified, is caused by the defendant’s own neglect, laches, or other conduct, such omission will not be a ground for refusing the relief which he asks, no matter how express may be the provision of the contract requiring a punctual performance and making it essential; a defendant cannot rely as a defense upon a breach which he himself has caused.”

*Pomeroy on Contracts*, Section 337.

It clearly appears from the lease, the option, and the conduct of the parties that this appellant has faithfully complied with its contract. It has paid the owners a large sum of money for three-fourths of that property and the owners have been the gainer both in money and property and still own one-fourth interest of this mining property in addition to the large sales price paid them. The conduct of the owners was such that it ought not to receive the approval of equity.

Their promise to apply the royalties and rentals paid them in the period of time prior to May 25, 1937, was disregarded by them and they continued to refuse until the trustee of the Mount Gaines Mining Company in reorganization was compelled to appeal to the Court to enforce their promise. As a justification for their conduct some of the briefs assert that the appellant stood idly by and did nothing when it was notified that they would not apply the royalties upon the purchase price, when there was nothing the Mount Gaines Mining Company could have done except to do what it did and now when it appeals to the Court they try to defend their conduct and still persist in claiming the property by alleging, time is the essence of the contract.

Dated, Reno, Nevada,  
March 29, 1943.

Respectfully submitted,  
JAMES T. BOYD,  
*Attorney for Appellant.*





No. 10,333

IN THE  
**United States Circuit Court of Appeals**  
For the Ninth Circuit

JAMES P. HART, Trustee of International  
Mining & Milling Company (a corpora-  
tion), Debtor, and Mount Gaines Min-  
ing Company (a corporation), Debtor,  
*Appellant,*

VS.

CALIFORNIA PACIFIC TITLE AND TRUST  
COMPANY (a corporation), TITLE IN-  
SURANCE AND GUARANTY COMPANY (a  
corporation), HUMPHREY ESTATES, INC.  
(a corporation), HARRY LEE JONES,  
ARTHUR J. EDWARDS, D. R. GUSTAVESON,  
JAMES S. HAZEN, PERSIS E. HAZEN,  
BYRON HALVERSON and JOSEPH J.  
MUELLER,  
*Appellees.*

**APPELLANT'S PETITION FOR A REHEARING.**

JAMES T. BOYD,  
E. C. Lyon Building, Reno, Nevada,  
*Attorney for Appellant  
and Petitioner.*

**FILED**

**JUL 21 1943**

**PAUL P. O'BRIEN,**  
**CLERK**



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No. 10,333

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

---

JAMES P. HART, Trustee of International Mining & Milling Company (a corporation), Debtor, and Mount Gaines Mining Company (a corporation), Debtor,  
*Appellant,*

VS.

CALIFORNIA PACIFIC TITLE AND TRUST COMPANY (a corporation), TITLE INSURANCE AND GUARANTY COMPANY (a corporation), HUMPHREY ESTATES, INC. (a corporation), HARRY LEE JONES, ARTHUR J. EDWARDS, D. R. GUSTAVESON, JAMES S. HAZEN, PERSIS E. HAZEN, BYRON HALVERSON and JOSEPH J. MUELLER,

*Appellees.*

## APPELLANT'S PETITION FOR A REHEARING.

---

*To the Honorable Curtis D. Wilbur, Presiding Judge, and to the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:*

The appellant respectfully petitions the Court for a rehearing in this cause for the following reasons:

In the opening brief of appellant herein, the appellant stated that there were only two questions to be decided:

“1. Was the option, embodied in the lease, exercised by the notice of May 25, 1937?”

“2. If the option was exercised was the appellant entitled to have 75% of the royalties that had been paid applied upon the purchase price of the property and on the first installment?”

(Opening Brief, pages 13-14.)

That the notice dated May 25, 1937, was an exercise of the option by reason of the statement contained in the notice:

“hereby elects to exercise, and does exercise, the option to purchase mentioned in said above named agreement”

Then followed a request in that notice for the application of 75% of the rents and royalties paid be applied upon the first installment of the purchase price. That notice:

“hereby elects to exercise, and does exercise, the option to purchase \* \* \*”

was the exercise and created a liability against the Mount Gaines Mining Company to pay the owners \$50,000.00 and had the effect of changing the option from an option to purchase into an executory contract of sale and purchase binding the Mount Gaines Mining Company to pay \$50,000.00 on the purchase price and the owners were bound to convey the property on such payment. The relationship between the parties was

changed. Assuming the liability to pay \$50,000.00 made the Mount Gaines Mining Company the equitable owner of the three-fourths interest, and entitled to the beneficial interest of the three-fourths interest.

*Pomeroy's Equity Jurisprudence*, Fourth Edition, Section 368, page 685;

*Smith v. Bangham*, 156 Cal., page 363;

*Horgan, et al. v. Russell*, 43 L. R. A. (N. S.), page 1150;

*Turner v. McCormick*, 67 L. R. A., page 853;

*Johnson v. Trippe*, 33 Fed., page 740;

*Pollock, et al. v. Brookover*, 6 L. R. A. (N. S.), page 403.

“The vendee is looked upon and treated as owner of the land; an equitable estate has vested in him commensurate with that provided for by the contract, whether in fee, for life, or for years; although the vendor remains owner of the legal estate, he holds it as a trustee for the vendee to whom all the beneficial interest has passed.”

*Pomeroy on Contracts, Specific Performance*, Second Edition, Section 314, page 400.

The lease and option was merged into the executory contract of sale and purchase and, except for the one-fourth interest retained by the owners, the lease and option was terminated. All payments thereafter made by the Mount Gaines Mining Company, from the sale of ores or from any other source, were payments upon the purchase price and not either rentals or royalties.

If the authorities cited are correct, that the exercise of the option made the optionee the equitable owner

of the three-fourths interest, there could be no lease, nor rents, nor royalties. There was nothing that the owners would apply from time to time on the purchase price. The Court's decision that the rents and royalties paid prior to the exercise of the option, while the lease and option was in force, were not intended to be applied upon the purchase price by reason of the language contained in the option:

“and shall from time to time be credited upon the installment of purchase price next becoming due and payable after the first installment herein mentioned”

had the effect of abrogating the entire provision agreeing to apply 75% of the rents and royalties, paid under the lease and option, upon the purchase price. That clause, as a matter of fact, is absolutely superfluous under the present interpretation of the option, for it could have been left out entirely and the law would have compelled the application of all payments paid on the purchase price to be applied thereon.

The clause in the option:

“It is further agreed that 75% of the royalty and rental payments paid under this lease shall be applied and credited upon the purchase price of said three-fourths interest.”

was a right given to the optionee in consideration of the covenants and agreements contained in the lease and option and granted to the optionee a contingent interest in that fund that would become vested in the optionee when the optionee assumed the liability to pay \$50,000.00 and purchased the mining property.



There is no ambiguity and it is clear cut and as the Court stated in its opinion:

“Torn from its context this language might well be deemed conclusive.”

That clause is the promise upon the part of the optionors to apply 75% of the rents and royalty payments *paid under this lease*. The entire clause with reference to royalties and rentals shows that the purpose of that clause, and the intention of the parties, was to apply 75% of the royalties and rentals upon the purchase price and all rules of construction require that the intention of the parties shall be given full effect, and a construction be given it that will give effect to the intention. If there was any ambiguity it was an ambiguity created by the optionors as appears from the Court's opinion by the statement in that clause:

“and shall from time to time be credited upon the installment of purchase price next becoming due and payable after the ‘first installment herein mentioned.’ The reference to the ‘first installment’ can only be to the \$10,000 cash payment required to be made at the time of notice of exercising the option. If this language is to be given any effect, it must mean, at the least, that the credits of 75% of the rents and royalties were to be made only upon the subsequent installments and not on the down payment.”

The Court further stated:

“Effect must also be given the language found elsewhere in the agreement, namely, that the royalty payments were ‘to be considered as a

rental only'. Taking this somewhat ambiguous contract by its four corners and attempting to construe it reasonably, it would appear, indeed, that rentals or royalties paid prior to the exercise of the option were not to be credited on any of the installments of the purchase price, either the first or the later ones, but were to belong to the lessor absolutely."

By the language of that part of the option which the Court seems to have given slight attention:

"the royalties and rental payments *paid under this lease* shall be applied and credited upon the purchase price \* \* \*"

there is no limitation in that clause and if there be any ambiguity, it is to be remembered that the whole of that portion of the option with reference to the royalties is a promise upon the part of the optionors to apply the royalties upon the purchase price.

"A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful."

*Cal. C. C.*, Section 1636.

"If the terms of a promise are in any respect ambiguous or uncertain, it must be interpreted in the sense in which the promisor believed, at the time of making it, that the promisee understood it."

*Cal. C. C.*, Section 1649.

"When the terms of an agreement have been intended in a different sense by the different parties

to it, that sense is to prevail against either party in which he supposed the other understood it, and when different constructions of a provision are otherwise equally proper, that is to be taken which is most favorable to the party in whose favor the provision was made.”

*C. C. P.*, Section 1864.

“In cases of uncertainty not removed by the preceding rules, the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist. The promisor is presumed to be such party; except in a contract between a public officer or body, as such, and a private party, in which it is presumed that all uncertainty was caused by the private party.”

*Cal. C. C.*, Section 1654.

As heretofore set out in this petition, that if the exercise of the option made the optionee the equitable owner of the property and of the beneficial interest and the optionor was merely a trustee of the title, there could be no rents nor royalties to be paid to the owner but all payments made thereafter were payments upon the debt incurred in the purchase of the property, or, as usually stated, upon the executory contract to purchase the property.

In that view the only rents and royalties that could be applied upon the purchase price were rents and royalties paid prior to the exercise of the option.

“Particular clauses of a contract are subordinate to its general intent.”

*Cal. C. C.*, Section 1650.

The construction given by the lower Court and approved by this Court destroys the whole of the promise to apply the royalties and rentals upon the purchase price and that construction is contrary to the provisions of the California statutes cited and particularly *Cal. C. C.*, Section 1654:

“the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist. The promisor is presumed to be such party;”

If we take the construction given to the option by the lower Court and adopted by this Court, that the \$10,000.00 must be paid in cash at the time of giving notice to exercise the option and that the option would not be exercised unless such \$10,000.00 was paid in cash, we still would not be the equitable owner of the property and we would have to continue to pay rents and royalties and those rents or royalties would be applied upon the purchase price. A construction of that kind is contrary to all of the authorities heretofore cited in relation to the effect to be given to the exercise of an option. The Mount Gaines Mining Company would still have to pay rents and royalties, and the lease would continue to be in force on the three-fourths interest. The full effect of that construction is to release the optionor from applying

“75% of the royalties and rental payments paid under this lease shall be applied and credited upon the purchase price of said three-fourths interest in said property herein provided to be sold.”

and if the authorities heretofore cited be correct, that the option be exercised and we become the owner, there are no rents paid upon the three-fourths interest after the exercise, but all payments are payments upon the purchase price. The construction given has released the optionor from applying any royalties or rentals upon the purchase price and simply renders the provisions quoted to be void.

“An interpretation which gives effect is preferred to one which makes void.”

*Cal. C. C.*, Section 3541;

*Toland v. Toland*, 123 Cal., page 140;

*Sample v. Fresno Flume etc. Co.*, 129 Cal., page 223.

After the option was exercised, three-fourths of all the ores sold was the property of the Mount Gaines Mining Company and one-fourth was subject to the terms of the lease. The owners of the one-fourth interest were entitled to receive as rents and royalties 10% of one-fourth of the proceeds; the 75% of the ores sold was not subject to rents or royalties but came to the Mount Gaines Mining Company from the sale of its own property.

If the above view is correct then the demand contained in the notice exercising the option, to apply 75% of the royalties theretofore paid, should have been complied with. The contingent interest owned by the optionee, in the royalties theretofore paid, became vested and the 75% belonged to the optionee to be applied upon the purchase price, and was one which

was enforceable in law and equity. The application of that 75% would have satisfied the first installment and part of the second installment.

Wherefore the appellant prays this Honorable Court that a rehearing may be granted in order that the conclusions arrived at and stated in the Opinion herein may be re-examined in the light of the foregoing authorities and statement, and thereupon that the decision of this Court, entered on the 24th day of June, 1943, be set aside and a mandate returned to the District Court directing it to set aside the order dismissing appellant's petition.

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**MOTION FOR STAY OF MANDATE.**

In the event that this Petition for a Rehearing is denied, the appellant respectfully moves the Court for a stay of mandate, sufficient in length of time to permit him to apply to the Supreme Court of the United States for a Writ of Certiorari, to the end that this cause may be reviewed and determined by said Court.

Dated, Reno, Nevada,  
July 19, 1943.

Respectfully submitted,

JAMES T. BOYD,

*Attorney for Appellant  
and Petitioner.*

## CERTIFICATE OF COUNSEL.

I hereby certify that I am counsel for appellant and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, Reno, Nevada,  
July 19, 1943.

JAMES T. BOYD,  
*Counsel for Appellant  
and Petitioner.*





No. 10345

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16

United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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FARM PRODUCTS CO., a corporation,  
Appellant.

vs.

UNITED STATES OF AMERICA,  
Appellee.

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Transcript of Record

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Upon Appeal from the District Court of the United States  
for the Southern District of California,  
Central Division

FILED

FEB - 2 1943

PAUL P. O'BRIEN,  
CLERK



No. 10345

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United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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FARM PRODUCTS CO., a corporation,  
Appellant.  
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Transcript of Record

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Upon Appeal from the District Court of the United States  
for the Southern District of California,  
Central Division



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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## NAMES AND ADDRESSES OF ATTORNEYS

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LEO V. SILVERSTEIN, ESQ.

United States Attorney

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Assistants U. S. Attorney  
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Los Angeles, Calif. [1\*]

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\*Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States in and  
For the Southern District of California

Central Division

In Bankruptcy  
No. 41247-RJ

In the Matter of  
FARM PRODUCTS CO.  
Debtor.

PETITION OF FARM PRODUCTS CO.  
UNDER SECTION 75 OF THE BANK-  
RUPTCY ACT

To the Honorable Judges of the District Court  
of the United States for the Southern District of  
California, Central Division:

The petition of Farm Products Co., a corpora-  
tion, of 117 West Ninth Street in the City of Los  
Angeles, County of Los Angeles, State of Cali-  
fornia, respectfully represents:

That your petitioner is a corporation, organized  
and existing under and by virtue of the law of  
California, whose principal and only business is  
producing products of the soil and engaged in  
farming within the County of Los Angeles, State  
of California, in the district and division aforesaid.  
That all of the stockholders of your petitioner,  
Farm Products Co., are persons whose entire time  
is engaged and whose incomes and each of them  
are more than seventy five per cent (75%) from  
their activities and endeavors in producing products

of the soil and farming. That such farming operations of your petitioner, Farm [2] Products Co. and that of each of its stockholders, occur in the County of Los Angeles, State of California, where your petitioner is operating a farm consisting of approximately Four Hundred Fifty (450) acres, more or less, cropping the same at the present time to cauliflower, cabbage, Kentucky Wonder beans, cucumbers, summer squash; that your petitioner is unable to meet his debts as they mature; that your petitioner desires to effect an extension of time to pay his debts under Section 75 of the Bankruptcy Act.

That the schedule hereto annexed and marked Exhibit "A", and verified by your petitioner's oath, contains a full and true statement of all of its debts, and the names and places of residence of its creditors.

That the schedule hereto annexed and marked Exhibit "B", and verified by your petitioner's oath, contains an accurate inventory of all of its property and assets, both real and personal and such further statements concerning said property as are required by law.

That at the time of the filing of this petition, your debtor is in actual possession of and operating its properties in the County of Los Angeles and within the district and division aforesaid, in the State of California.

That on August 17, 1942, an action was commenced in this court in which the plaintiff was

and is the United States of America and the defendant therein is your petitioner, Farm Products Co.; that said action is a civil action known and numbered in the files of this court as 2371-RJ Civil, and is one brought to foreclose a chattel mortgage and for the appointment of a temporary receiver and for the appointment of a permanent operating general receiver. That in said action, your petitioner has been served but has not answered, the time for answering having not yet expired. That in said proceeding [3] 2371-RJ, the court, by the Honorable G. E. Beaumont, United States District Judge, has made its order appointing Carl J. Williams, Rural Rehabilitation Supervisor, United States Department of Agriculture, Farm Security Administration, as temporary receiver. That said receiver may have qualified by the time this petition is filed, but at the time of the making of this petition, he had not taken possession of the properties of your petitioner, nor otherwise asserted his authority.

That your petitioner, Farm Products Co., has elected to take for the benefit of itself and its creditors, the rights, remedies and protection afforded by Section 75 of the Bankruptcy Act, and has authorized the filing of these proceedings by action duly had in that behalf as more fully appears by the certified copy of the resolution as made by your petitioner attached hereto, marked Exhibit "C".

Wherefore, your petitioner prays that this petition may be approved by the court and proceedings had in accordance with the provisions of said action.

[Seal]

FARM PRODUCTS CO.,

a corporation

By FRED MANSUR,

President.

RUPERT B. TURNBULL,

Petitioner, Farm Debtor. [4]

---

State of California

County of Los Angeles—ss.

I, Fred Mansur, duly authorized to make this verification and President of Farm Products Co., a corporation, the petitioning debtor mentioned and described in the foregoing petition, hereby make solemn oath that the statements contained therein are true according to the best of my knowledge, information and belief.

[Seal]

FARM PRODUCTS CO.,

a corporation,

Petitioner.

FRED MANSUR

President.

Subscribed and sworn to before me this 24 day of August, 1942.

[Seal]

MARGARET BARNEY

Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Filed Aug. 24, 1942. [5]

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[Title of District Court and Cause.]

### CERTIFICATE OF RECORD ON REVIEW

I, C. P. Von Herzen, Conciliation Commissioner in Bankruptcy, at Los Angeles, California, respectfully certify that the above entitled bankruptcy proceeding is pending before me under a general order of reference, and I hereby certify the following proceedings were duly had in said cause before me.

A motion to dismiss proceedings and to vacate stay of proceedings in the Federal Court by secured creditor United States of America came on regularly for hearing on the 17th day of September, 1942. The secured creditor appeared by Assistant United States Attorney Mildred L. Kluckhohn and the debtor appeared by its President, Fred Mansur personally, and through its attorney Rupert B. Turnbull. The following question was presented to me for decision: Whether the farm debtor herein was a farmer within the intent and meaning of Subsection R of Section 75 of the Bankruptcy Act, which reads as follows:

“For the purposes of this section, Section 4(b), and Section 74, the term ‘farmer’ includes not only an individual who is primarily bona fide personally [6] engaged in producing products of the soil but also any individual who is primarily bona fide personally engaged in dairy farming, the production of poultry or livestock, or the production of poultry products or livestock products in their unmanufactured state, or the principal part of whose income is derived from any one or more of the foregoing operations, and includes the personal representatives of a deceased farmer; and a farmer shall be deemed a resident of any county in which such operations occur.”

That attached hereto and made a part hereof are the Findings of Fact and Conclusions of Law duly made and entered herein by me upon the foregoing hearing; that attached hereto and made a part hereof is a copy of the Order duly made and entered herein.

I hereby certify that in the proceedings that have been pending before me I have determined that the petitioner was not a farmer within the intent and meaning of Subsection R of Section 75 of the Bankruptcy Act.

Submitted herewith are the following documents:

(1) Notice of motion and motion to dismiss proceedings and to vacate stay of proceedings in the Federal Court by secured creditor United States of America;

(2) Findings of Fact and Conclusions of law by C. P. Von Herzen, Conciliation Commissioner, dated October 14, 1942;

(3) Order dismissing proceedings and vacating stay of proceedings in Federal Court dated October 14, 1942;

(4) Objections by farm debtor to proposed findings and orders;

(5) Farm debtor's petition for review of the order of Conciliation Commissioner C. P. Von Herzen purporting to dismiss this proceedings.

C. P. VON HERZEN

Conciliation Commissioner  
in Bankruptcy

[Endorsed]: Filed Oct. 24, 1942. [7]

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[Title of District Court and Cause.]

### SPECIAL APPEARANCE

Comes now the United States of America, a secured creditor of Farm Products Co., the above named debtor, in the above entitled proceeding, and enters its special appearance herein and appears specially for the sole purpose of making a Motion to Dismiss the above entitled proceedings and to Vacate Stay of Proceedings in Federal Court.



Dated this 12th day of September, 1942.

LEO V. SILVERSTEIN

United States Attorney

JAMES L. CRAWFORD

Asst. United States Attorney

MILDRED L. KLUCKHOHN

Asst. United States Attorney

[Endorsed]: Filed Jan. 5, 1943. [8]

---

[Title of District Court and Cause.]

NOTICE OF MOTION TO DISMISS PROCEEDINGS AND TO VACATE STAY OF PROCEEDINGS IN FEDERAL COURT BY SECURED CREDITOR, UNITED STATES OF AMERICA.

To the above-named debtor, Farm Products Co., and to its attorney, Rupert V. Turnbull:

Please Take Notice that on Thursday, the 17th day of September, 1942, at the hour of 2 o'clock P.M. of said day, or as soon thereafter as counsel can be heard, at the office of the Supervising Conciliation Commissioner, Room 228, Federal Building, Spring and Temple Streets, Los Angeles, California, before the Honorable C. P. Von Herzen, Conciliation Commissioner for the County of Los Angeles, State of California, the United States of America, a secured creditor of the above named debtor, will move the above entitled court as follows:

1. To dismiss the within and above entitled proceedings and the Petition of the debtor therein, and to make its Order of Dismissal thereof.

2. To vacate, set aside and dissolve any and all stays [9] of proceedings, injunction, and/or restraining orders now in force or effect by virtue of or arising out of the filing or pendency of said proceedings and to make its order vacating and setting aside the same.

Said motion will be made on each and every of the following grounds:

1. That said debtor is not a farming corporation where at least 75 percentum of the stock is owned by actual farmers as so provided and defined by Section 75S(4)(a) of the Bankruptcy Act as amended.

2. That the owner of 75 percentum of the stock of said corporation debtor is not a farmer as defined by Section 75R of the Bankruptcy Act as amended.

3. That said owner of 75 percentum of the stock of said corporation debtor is neither an individual who is primarily bona fide personally engaged in producing products of the soil, or the principal part of whose income is derived from said farming activities.

4. That the above entitled court is without jurisdiction in this proceeding for the reason that 75 percentum of the stock is not owned by actual farmers, as provided in Section 75S(4)(a) of the Bankruptcy Act, in that the owner of said 75 percentum of the stock is not a farmer as defined by Section 75R of the Bankruptcy Act, as amended.

5. That this proceeding was not instituted by the debtor corporation in good faith and that it is impossible for said debtor corporation to rehabilitate itself or to offer a fair, just or equitable settlement or composition with its creditors.

Said motions and each of them will be based on each and every of the following: [10]

1. The affidavits of Charles A. Slack, Palaemon Bush, W. W. Powell, Earl D. Killion and Paul E. Williams hereto attached and filed of even date herewith.

2. The Memorandum of Points and Authorities attached hereto and Brief supporting said Motion.

3. All and singular the papers, files and records in the above entitled proceeding.

Dated: September 11, 1942.

LEO V. SILVERSTEIN

United States Attorney

JAMES L. CRAWFORD

Assistant United States

Attorney

MILDRED L. KLUCKHOHN

Assistant United States

Attorney

[Endorsed]: Filed Oct. 24, 1942. [11]

[Title of District Court and Cause.]

NARRATIVE STATEMENT OF TESTIMONY  
BEFORE CONCILIATION COMMISSIONER

It is Hereby Stipulated by and between the parties hereto through their respective counsel that the following is a true narrative statement of the testimony produced before Conciliation Commissioner C. P. Von Herzen on September 17, 1942.

Mr. Turnbull (Attorney for the Farm Debtor) stated he desired to make a motion to strike certain affidavits.

Miss Kluckhohn (U. S. Attorney) stated she desired to move to dismiss the proceedings upon the ground that the Court had no jurisdiction in the matter, and would rely principally upon the affidavits on file. She then called as a witness J. L. Woolsey of the Division of Corporations of the State of California who testified that a permit was issued by the Department authorizing the issuance of the stock of the Farm Products Co. to Fred Mansur, in escrow, and that an escrow holder had been approved by the Department. That following request of the Farm Administration no further steps had been taken by the corporation and the stock had not been distributed. [12]

Miss Kluckhohn then stated that she relied upon the affidavits on file in support of her motion.

Mr. Turnbull then objected to the affidavit of Paul E. Williams on the ground that he was civilly dead, having been convicted in the Federal District

Court of Washington, having served a term at McNeil's Island, and never having been pardoned, and therefore not entitled to be heard as a witness.

The Court took the matter under submission.

### FRED MANSUR

then called as a witness, testified as follows:

That he formerly lived in Los Angeles City, that he removed to the farm property of Farm Products Co. in Los Angeles County near the City of Compton, generally known as Dominguez Hill. That actual physical possession took place on May 7th or 8th, 1942. That the lease comprised 460 acres. That he and his wife moved into a place on the farm property with their household belongings. That he changed his voting place to this new precinct. That this was farm land evacuated by the Japanese.

That prior to this time he had been a practicing attorney in Los Angeles. That he closed his law office and turned unfinished matters over to another attorney. That after he was ousted from the farm project by the Farm Security Administration he returned to the office of the company in Los Angeles but did not resume the practice of law. That he and his wife continued to live on the farm property.

That a break occurred on June 10th with Paul Williams, his partner, and the Farm Administration ordered that said Paul Williams take charge

(Testimony of Fred Mansur.)

of the enterprise, and that said Fred Mansur have no further voice in the management.

That the work done by said Fred Mansur during this period was first incorporating the company, making application for Government loans, securing permit to issue stock, bringing [13] needed articles to the farm. That the man in charge of the actual field labor, and hiring of Mexican help was Mr. Reynolds. That there were foremen for the different sections of the farm. That the crops were vegetables; cabbage, beets, cauliflower, celery etc. That these crops had been planted, but were not ready to market, at the time Farm Security took charge.

That Farm Products Co. had no other activity than this farming project. It was all leased ground.

That Mr. Reynolds was a practical farmer. That Paul E. Williams claimed to have had farming experience in Imperial Valley. That he kept the company books and contacted buyers for future vegetable crops when they were matured.

That Fred Mansur was born in New Hampshire on a farm and had farm experience up to the time he was 20 years old. That when he moved to this farm enterprise it was with the intention of changing his occupation to that of a farmer.

#### Cross Examination

Fred Mansur testified that after he moved on to the farm, about the middle of May, he closed his offices.

He was asked if it wasn't true that between May 7th and August 17th he had been in his office every

(Testimony of Fred Mansur.)

day. He stated that he was ousted from the farming project on June 11th and then asked his former associate for the privilege of again using the office. Mr. Kegley agreed to this but said he also desired to use the office until after the primary campaign. That this is the legal office of the company and Fred Mansur occupied it as President of the Company, although permitted no actual management of the company.

Mr. Mansur testified that during this period he did no legal business other than that of the company, conferences with the Farm Security Administration officials, etc. [14]

The Commissioner asked Fred Mansur how much of his time was spent in the company's office between May 7th and August 17th. The answer was 4 or 5 days per week.

Miss Kluckhohnn asked whose letterheads were used in writing letters for the company. The answer was that some times on plain stationery, but mostly on letterheads of Fred Mansur.

She asked Mr. Mansur if he had a thriving business and over objection, the witness was instructed to answer. The question was reframed and the witness asked if the purpose was not because the latter was unable to pay rent in town. Mr. Mansur answered that his wife had an independent income and he didn't have to worry about rent.

The witness was asked again what he did about the company affairs, and again repeated the different matters, calling attention to the fact that the

(Testimony of Fred Mansur.)

period involved was only a little over a month, from May 7th to June 8th, and that during that time the operation of the property was harmonious, and that he looked after the management of the company and did not interfere in the cropping of the farm.

The witness was asked how much he had received from the farming enterprise and stated \$190 was his recollection. He was asked about his income from the law business prior to this time. Later the witness testified that the \$190 he received was from loan funds.

The witness testified that while he had experience in farm work in New Hampshire, that he had no experience in growing vegetables in California. That the responsibility for the actual farming—hiring the help, and planting the ground devolved upon Mr. Reynolds, not upon Mr. Mansur or Mr. Williams.

The witness testified that he conferred with seed men about crops, and also conferred with Mr. Reynolds on this subject.

Miss Kluckhohn asked what was the witness' first contact [15] with Paul E. Williams. The witness testified that Williams was a client of Mr. Kegley, that the latter had endeavored to secure a pardon for Williams and was not successful. Miss O'Brien (Mr. Kegley's secretary) asked Mansur to try again to obtain this pardon. He admitted that he knew Williams was an ex-convict, and was willing to give him a break, because Williams said he



(Testimony of Fred Mansur.)

could not get employment or find any one who was willing to work with him.

### Redirect

Mr. Mansur testified that as President of the Company he executed a mortgage to the Government, signed all checks, both payroll and purchase of materials.

The Commissioner then asked if any legal work of a private nature was transacted during the period before referred to and Mr. Mansur testified that none had been done and that he was not open for business of that nature as he expected to go on with this farming project.

He was asked if he gave the office building notice that he was leaving in May. The witness testified that he did, and that he paid one month in advance. That before this month was up he was ousted from the farm and asked Mr. Kegley for the privilege of coming back into the office.

The Commissioner then asked about the stock of the company and the witness testified that he agreed to undertake the farming of this land but that it would have to be on a corporation basis, not as a partnership; that he agreed to give Williams 50% of the stock, that the latter was still entitled to that share of the stock, although none had been actually issued.

Miss Kluckhohn introduced the original application and farm plan which was accepted by the Government, and the witness pointed out that the

(Testimony of Fred Mansur.)

plan allowed \$200 per month for living expenses and \$200 per month for operating expense. [16]

Miss Kluckhohn examined the witness as to assets shown on the application to the Corporation Commission for the issuance of stock, and the witness explained how they were obtained and how set up in the application.

Miss Kluckhohn called attention to the farming experience shown on the operating plan introduced in evidence, and that this referred to Paul E. Williams.

The Commissioner inquired if Mr. Anderson was repaid money advanced to the corporation. He was paid back.

Mr. Turnbull asked how many acres of lime beans were then planted. The witness testified there were approximately 34 acres and that they should produce approximately \$40,000.

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### W. D. REYNOLDS

called on direct examination.

Mr. Reynolds testified that he was subpoenaed by Mr. Mansur; that he was an employee of Farm Products Co.; that he was employed by Paul E. Williams; that he had never had any conferences with the directors of the company; that in matters of planting the responsibility rested upon Mr. Williams but that in many cases it was left to his (Reynold's) judgment, and that the latter's recom-

(Testimony of W. D. Reynolds.)

mendations were mostly followed; that he directed the production end of the farm.

Cross Examination

Mr. Reynolds testified that he was employed for wages; that he was told in a general way what to do; that he directed the men; that he was a practical farmer. He testified that Mr. Williams was his immediate superior. That he knew of farming experience of Mr. Williams prior to this particular enterprise, many years experience.

Dated this 29 day of December 1942.

LEO V. SILVERSTEIN

U. S. Attorney

WM. W. WORTHINGTON

Asst. U. S. Attorney

Attorneys for United States  
of America.

FRED MANSUR

Attorney for Farm Debtor

[Endorsed]: Filed Dec. 30, 1942. [17]

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[Title of District Court and Cause.]

FINDINGS OF FACT AND  
CONCLUSIONS OF LAW

The above entitled cause came on regularly to be heard before the Honorable C. P. Von Herzen, one of the Conciliation Commissioners in Bankruptcy

of this Court, in Los Angeles County, State of California, on the 17th day of September, 1942, at Room 228 Federal Building, Los Angeles, California, at which time and place was presented to the Court a Motion to Dismiss Proceedings and to Vacate Stay of Proceedings in the Federal Court by Secured Creditor, United States of America, appearing specially through its attorneys, Leo V. Silverstein, United States Attorney for the Southern District of California, and James L. Crawford and Mildred L. Kluckhohn, Assistant United States Attorneys. The debtor corporation appeared by its president, Fred Mansur, personally, and through its attorney, Rupert B. Turnbull. [18]

The motion was based upon all and singular the papers, files, and records in the above entitled proceedings, notice, affidavits and memorandum of points and authorities.

The motion of said secured creditor, United States of America, was based on the following grounds: 1. That said debtor is not a farming corporation where at least 75 per centum of the stock is owned by actual farmers, as so provided and defined by Section 75S (4) (a) of the Bankruptcy Act, as amended. 2. That the owner of 75 per centum of the stock of said corporation debtor is not a farmer as defined by Section 75R of the Bankruptcy Act, as amended. 3. That said owner of 75 per centum of the stock of said corporation debtor is neither an individual who is primarily

bona fide personally engaged in producing products of the soil or the principal part of whose income is derived from said farming activities. 4. That the above entitled Court is without jurisdiction in this proceeding for the reason that 75 per centum of the stock is not owned by actual farmers, as provided in Section 75S (4) (a) of the Bankruptcy Act, in that the owner of said 75 per centum of the stock is not a farmer as defined by Section 75R of the Bankruptcy Act, as amended.

After introduction of testimony by both sides, the said motion was argued by respective counsel and submitted to the Court for its decision, and the Court, being fully advised, now makes its Findings of Fact and Conclusions of Law, as follows:

## FINDINGS OF FACT

### I.

The Court finds that on August 24, 1942, the above named debtor, through its president, Fred Mansur, filed its petition under Section 75 of the Bankruptcy Act and alleged, "That your petitioner is a corporation organized and existing under and by virtue of the laws of the State of California, whose principal and only business is producing products of the soil and engaged in farming within the County of Los Angeles, State of California, in the district and division aforesaid. That all of the stockholders of your petitioner, Farm Products Co., are persons whose entire time is engaged and

whose incomes, and [19] each of them, are more than 75 per centum from their activities and endeavors in producing products of the soil and farming.”

“That such farming operations of your petitioner, Farm Products Co., and that each of its stockholders, occur in the County of Los Angeles, State of California, where your petitioner is operating a farm consisting of approximately 450 acres, more or less, cropping the same at the present time to various vegetables; that your petitioner is unable to meet his debts as they mature; that your petitioner desires to effect an extension of time to pay his debts under Section 75 of the Bankruptcy Act; that the schedules hereto annexed marked Exhibit “A”, and verified by his oath, contain a full and true statement of all of its debts, with the names and places of residence of its creditors, and that the schedule thereto annexed marked Exhibit “B”, and verified by his oath, contains an accurate inventory of all its property, both real and personal, and such further statements concerning said property as are required by law.”

## II.

The Court finds that thereupon said petition was approved by the Court and it was ordered that said matter be referred to C. P. Von Herzen, one of the Conciliation Commissioners in Bankruptcy of this Court, to take such further proceedings therein as are required by said Act; that thereafter the first

meeting of creditors was held before said Conciliation Commissioner on the 17th day of September, 1942, at which time said motion to dismiss was made.

### III.

The Court finds that it is true that Farm Products Co., debtor herein, is a corporation organized and existing under and by virtue of the laws of the State of California, whose principal and only business is producing products of the soil and is engaged in farming within the County of Los Angeles, State of California, in the district and division aforesaid, to-wit: at Compton, California. The Court further finds that such farming operations of debtor corporation occur in the County of Los Angeles, State of California, where it is operating a farm consisting of approximately 400 acres, cropping the same to vegetables; that on May 7, 1942, Fred Mansur moved his residence to Route 1, [20] Box 841, Compton, California, in the County of Los Angeles, State of California. The Court further finds that the allegation in farm debtor's petition is not true in that all of the stockholders of the farm products company are persons whose entire time is engaged and whose incomes, and each of them, are more than 75 per centum from their activities and endeavors in producing products of the soil and farming. The Court further finds that even if said allegation were true, such is not the proper manner in which to allege the jurisdictional fact that the debtor is a farm corporation.

## IV.

The Court finds that the property of debtor corporation consists of personalty only, including livestock, farming equipment and machinery, leases, assignments, and other chattels, and crops, located or to be located on approximately 400 acres of land. That the growing crops consist of approximately 170 acres of land planted to various vegetables; that the care and harvest of said vegetable crops necessarily requires daily attention.

## V.

The Court finds that on July 9, 1942, upon application made, a permit was issued by the Commissioner of Corporations authorizing the issuance of all shares of stock to Fred Mansur not in excess of 25,000. That an escrow holder was appointed and approved by the Commissioner of Corporations in the person of one George Ross, for the purpose of holding said stock. That to date no stock has actually been issued by debtor corporation. The Court further finds that Fred Mansur, President of Farm Products Co., owns at least a 50 per cent interest in said debtor corporation.

## VI.

The Court finds that the primary and principal occupation of Fred Mansur, President of debtor corporation, and owner of at least a 50 per cent interest in said corporation, is not that of a farmer. The Court further finds that the primary and prin-



incipal occupation of Fred Mansur is that of an attorney at law, carrying on the legal business of said debtor corporation in the capacity of an attorney at law. The Court further finds that the only farming [21] experience that Fred Mansur has ever had was that obtained two or three years before reaching the age of twenty, on his father's ranch in the State of New Hampshire. That since reaching the age of twenty years, Fred Mansur has not engaged in farming activities nor has he since that time ever been personally physically engaged in the growing and harvesting of farm products and has, since 1917, up to the present time, been continuously, primarily and principally engaged in the practice of the law in the State of California. The Court finds that from May 7, 1942, to July 8, 1942, Fred Mansur, although residing with his family on the farm premises of debtor corporation, has spent most of his working hours of approximately five days a week in a business office at 117 West Ninth Street, Los Angeles, California, which office immediately before that time was occupied by Fred Mansur as an attorney at law, where he was daily actively engaged in the practice of law. The Court finds that during the period in question that Fred Mansur was at no time engaged in the manual operations of actual farming, that is, planting, raising, caring for and harvesting farm products on the premises belonging to debtor corporation. The Court further finds that the question as to what crops, when and how they shall be planted; when

and how the crops shall be harvested; to whom they shall be sold; for what price they shall be sold; and the preparation of land for planting, have at all times been determined by Paul E. Williams, Field Supervisor and actual farm manager and owner of the other one-half interest in said farming enterprise, and the foreman under his employ, Mr. Reynolds, who have at all times resided on said farming premises. That Mr. Reynolds has collaborated with Paul E. Williams in the actual management and supervision of said farming enterprise. The Court further finds that the labor policy has been determined solely by Paul E. Williams, who has, since the organization of said corporation, employed, discharged and managed all of the labor working on said premises; that the payroll has at all times been set up and the amount of wages determined by Mr. Williams.

## VII.

The Court finds that the activities of Fred Mansur during the period in question consists solely of taking care of the legal work of said corporation [22] in the capacity of an attorney at law; that approximately five days per week has been spent by Fred Mansur during the period in question in a business office located at 117 West Ninth Street, Los Angeles, California, which was, immediately preceding this time, his private law office. The Court further finds that his activities on behalf of said defendant corporation have been specifically

those of incorporating the organization, arranging for loans with the Farm Security Administration and others, conferring with the owners of land regarding leases, signing all papers and documents relating to said corporation as president, and signing all checks as president of the corporation. The Court further finds that although Fred Mansur lives on the farm premises, he has at no time taken any personal physical part in the production of agri-products, but has spent the greater portion of the working hours in his office at 117 West Ninth Street, Los Angeles, California. The Court further finds that neither the entire time of Fred Mansur, nor any portion of his time, has ever been engaged in the production of products of the soil and farming. The Court further finds that the farming enterprise of said debtor corporation is operating on leased land and that Fred Mansur, upon entering said corporation, contributed neither funds nor farming equipment and owns no property held by said corporation; and that all that was contributed by Fred Mansur to the said debtor corporation was his legal services.

### VIII.

The Court finds that during the period under examination, Fred Mansur received no income from said debtor corporation which was derived from the operations of the farming enterprise. That Fred Mansur received at least the sum of \$190.00 during said period as a personal advance for some of his

legal services and for the payment of his expenses in connection with his legal work for said debtor corporation; that said sum was wholly taken from the proceeds of a \$36,150.00 loan obtained from the United States Department of Agriculture, Farm Security Administration, and not from income derived from farming activities or the production of farm products. The Court further finds that the income of Fred Mansur is not more than 75 per centum from activity and endeavor in producing products of the soil and farming. That from the [23] beginning of 1942 up to May 7, 1942, Fred Mansur carried on a general practice as an attorney at law; that the principal part of the income of Fred Mansur was not derived from farming operations, or from the production of products of the soil and farming; that since the 7th day of May, 1942, the said sum of \$190.00 was received by said Fred Mansur from the loan proceeds and not from farming operations, and the payment was for expenses incurred and for legal services rendered for said debtor corporation.

### IX.

The Court finds that the United States of America is a secured creditor of Farm Products Co., by virtue of a loan made to debtor corporation through the United States Department of Agriculture, Farm Security Administration on May 20, 1942. The Court further finds that the payment of said loan of \$36,150.00 is evidenced by a promis-

sory note secured by two chattel and crop mortgages which cover all of the property owned and operated by said debtor corporation.

The Court finds that due and proper notice of the motion hereinabove referred to, made on behalf of the secured creditor, United States of America, was given to and received by the debtor corporation prior to the hearing of said motion.

And From the Foregoing Findings of Fact, the Court Now Makes Its Conclusions of Law, as Follows:

## CONCLUSIONS OF LAW

### I.

The Court concludes that the debtor corporation is not a farming corporation where at least 75 per centum of the stock is owned by actual farmers, as so provided and defined by Section 75S(4) (a) of the Bankruptcy Act, as amended.

### II.

The Court concludes that the owner of at least a one-half interest in said debtor corporation, or holder of 75 per centum of the stock of said [24] debtor corporation, is not a farmer, as defined by Section 75R of the Bankruptcy Act, as amended, in that he is neither an individual who is primarily bona fide personally engaged in producing products of the soil or the principal part of whose income is derived from said farming activities.

## III.

The Court concludes that by virtue of the fact that the owner of at least one-half interest in said corporation, or the holder of 75 per centum of the stock of said debtor corporation, is not a farmer as defined by Section 75R of the Bankruptcy Act, as amended, the above entitled Court is without jurisdiction in these proceedings.

## IV.

The Court concludes that the Motion to Dismiss Proceedings and to Vacate Stay of Proceedings in the Federal Court should be granted and that these proceedings should be dismissed, and that all proceedings pending in the Federal Court affecting this debtor should be allowed to go forward and all stays of such proceedings should be vacated.

That judgment be entered accordingly.

Done in Open Court this 14th day of October, 1942.

C. P. VON HERZEN

Conciliation Commissioner in  
Bankruptcy, in and for the  
County of Los Angeles.

[Endorsed]: Filed Oct. 24, 1942. [25]

[Title of District Court and Cause.]

ORDER DISMISSING PROCEEDINGS AND  
VACATING STAY OF PROCEEDINGS IN  
FEDERAL COURT

The above entitled cause came on regularly to be heard on the 17th day of September, 1942, before the Honorable C. P. Von Herzen, Conciliation Commissioner in Bankruptcy, in and for the County of Los Angeles, at Room 228 Federal Building, Los Angeles, California, at which time and place was presented to the court for its hearing and determination a Motion to Dismiss Proceedings and to Vacate Stay of Proceedings in the Federal Court by Secured Creditor, United States of America, appearing by and through its attorney, Leo V. Silverstein, United States Attorney for the Southern District of California, and James L. Crawford and Mildred L. Kluckhohn, Assistant United States Attorneys. The debtor appeared by its President, Fred Mansur, personally, and through its attorney, Rupert B. Turnbull. The motion of the secured creditor, United States of America, was based upon all and singular the papers, files and records in the above entitled proceedings, upon affidavits and memorandum of points and authorities attached thereto.

The motion was argued by respective counsel and submitted to the court for its decision, and the court being fully advised and having heretofore made and filed its Findings of Fact and Conclusions of Law, [26]

Now, Therefore, It Is Ordered, Adjudged and Decreed:

That the Motion to Dismiss Proceedings and to Vacate Stay of Proceedings in Federal Court by Secured Creditor, United States of America, be, and the same is, hereby granted and these proceedings be, and they are, hereby dismissed.

It Is Further Ordered, Adjudged and Decreed that the stay of proceedings affecting the action now pending before the Federal Court arising out of the pendency of this proceeding be and the same is hereby set aside and vacated, and any and all of such actions or proceedings heretofore stayed, be and the same is hereby permitted to go forward to final determination in the said Federal Court, and with enforcement of judgments or orders made, or which may be made, in any such Federal Court.

Done in Open Court this 14th day of October, 1942.

C. P. VON HERZEN

Conciliation Commissioner in  
Bankruptcy, in and for the  
County of Los Angeles.

[Endorsed]: Filed Oct. 24, 1942. [27]



[Title of District Court and Cause.]

AMENDED FARM DEBTOR'S PETITION FOR  
REVIEW OF THE ORDER OF CONCILIA-  
TION COMMISSIONER C. P. VON HER-  
ZEN PURPORTING TO DISMISS THIS  
PROCEEDING.

Comes now the Farm Debtor herein, Farm Products Co., a corporation, and petitions for a review of the order of C. P. Von Herzen, Conciliation Commissioner of this Court, for the County of Los Angeles, which order is dated on or about October 14, 1942, and was made by the Honorable C. P. Von Herzen acting as Conciliation Commissioner of this Court for the County of Los Angeles, and which order purports to dismiss this proceeding. Said order is in the following words, figures and form, to-wit:

“The above entitled cause came on regularly to be heard on the 17th day of September, 1942, before the Honorable C. P. Von Herzen, Conciliation Commissioner in Bankruptcy, in and for the County of Los Angeles, at Room 228 Federal Building, Los Angeles, California, at which time and place was presented to the court for its hearing and determination a Motion to Dismiss Proceedings and to vacate Stay of Proceedings in the Federal Court by Secured Creditor, United States of America, appearing by and through [28] its attorney, Leo V. Silverstein, United States Attorney for the South-

ern District of California, and James L. Crawford and Mildred L. Kluckhohn, Assistant United States Attorneys. The debtor appeared by its President Fred Mansur, personally, and through its attorney, Rupert B. Turnbull. The motion of the secured creditor, United States of America, was based upon all and singular the papers, files and records in the above entitled proceedings, upon affidavits and memorandum of points and authorities attached thereto.

The motion was argued by respective counsel and submitted to the court for its decision, and the court being fully advised and having heretofore made and filed its Findings of Fact and Conclusions of Law,

Now, Therefore, It Is Ordered, Adjudged and Decreed:

That the Motion to Dismiss Proceedings and to Vacate Stay of Proceedings in Federal Court by Secured Creditor, United States of America, be and the same is, hereby granted, and these proceedings be, and they are, hereby dismissed.

It Is Further Ordered, Adjudged and Decreed, that the stay of proceedings affecting the action now pending before the Federal Court arising out of the pendency of this proceeding be and the same is hereby set aside and vacated, and any and all of such actions or proceedings heretofore stayed, be and the same

is hereby permitted to go forward to final determination in the said Federal Court, and with enforcement of judgments or orders made, or which may be made, in any such Federal Court.

Done in Open Court this 14th day of October, 1942.

C. P. VON HERZEN

Conciliation Commissioner in  
Bankruptcy in and for the  
County of Los Angeles." [29]

Your petitioner feeling aggrieved at the order dismissing this proceeding, hereby petitions for a review of said order or orders so dismissing, and prays that the same be reviewed by a judge of this court.

Petitioner alleges that said orders complained of are in error in this, that the farm debtor herein is a farmer within the meaning of Section 75 of the National Bankruptcy Act, and the dismissal of this proceeding on the ground that the said corporation does not qualify within the meaning of Section 75 of the Bankruptcy Act is contrary to fact and contrary to law. That said farm debtor was organized and incorporated at the request of the United States Government to take over and operate lands of evacuated Japanese Nationals. That the sole object and purpose of the farm debtor was to farm lands previously farmed by said Japanese. That all the stockholders of the Farm

Debtor were persons giving all their time to such business and as such were farmers. That more than 75% of the stock of the debtor, to-wit, all of the same was held and owned by two persons, Paul E. Williams and Fred Mansur, who devoted all of their time exclusively to the affairs of the farm debtor and were farmers.

That the Conciliation Commissioner erred in dismissing this proceeding in that the order of the said Commissioner is contrary to law and against law.

Wherefore your petitioner feeling aggrieved at said order of dismissal, prays that the proper certificate be made by C. P. Von Herzen, or by his successor in office, and that the record in this proceeding be transmitted to a Judge of the District Court in the manner provided by law. The farm debtor hereby offers to pay and tenders such sum as may be necessary to prepare the record in accordance with the procedure required by law, and pursuant to the rules and customs of this court.

FARM PRODUCTS CO.,

a corporation,

By FRED MANSUR

President.

RUPERT B. TURNBULL

Attorney for Debtor.

[Endorsed]: Filed Nov. 12, 1942. [30]

In the District Court of the United States in and  
For the Southern District of California

No. 41247-RJ

In the Matter of  
FARM PRODUCTS CO.,  
Debtor.

JUDGMENT AFFIRMING ORDER OF CON-  
CILIATION COMMISSIONER DISMISS-  
ING PROCEEDINGS IN BANKRUPTCY  
AND VACATING STAY IN CIVIL AC-  
TION.

A review of the Order of the Conciliation Commissioner dated the 14th day of October, 1942, Dismissing the Proceedings therein, and Vacating Stay of Proceedings in the case of United States of America, plaintiff vs. Farm Products Co., defendant, No. 2371-RJ, Civil, in the United States District Court for the Southern District of California, having duly come on for hearing before the United States District Court for the Southern District of California, the Honorable Ralph E. Jenney, Judge, presiding: and the matter having been submitted upon briefs without oral argument, and the Court, after due consideration, having on the 23rd day of November, 1942, rendered its opinion that the said Order of the said Conciliation Commissioner be in all respects affirmed.

It is Hereby Ordered, Adjudged and Decreed that the Order of the Conciliation Commissioner, Honorable C. P. Von Herzen, dated the 14th day

of October, 1942, Dismissing Bankruptcy Proceedings therein and Vacating The Stay in the case of the United States of America, plaintiff, vs. Farm Products Co., defendant, No. 2317-RJ, Civil, now pending in the [31] United States Court for the Southern District of California, Central Division be

**affirmed.**

Dated this 24th day of November, 1942.

RALPH E. JENNEY

United States District Judge.

Presented by:

LEO V. SILVERSTEIN,

United States Attorney.

JAMES L. CRAWFORD,

Asst. United States Attorney.

WM. W. WORTHINGTON,

Asst. United States Attorney.

Approved as to form pursuant to Rule 8.

RUPERT B. TURNBULL,

Attorney for Debtor.

Judgment entered Nov. 24, 1942. Docketed Nov. 24, 1942. C. O. Book 12, Page 598. Entered in Bankruptcy Docket 11-24-42. Edward L. Smith, Clerk. By L. B. Figg, Deputy.

[Endorsed]: Filed Nov. 24, 1942. [32]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the United States of America and to Leo V. Silverstein, Esq., James L. Crawford, Esq., and Wm. W. Worthington, Esq., its attorneys:

You and each of you will please take notice that Farm Products Co., a corporation, debtor in the above matter, is appealing from an order of the above entitled Court made and entered in the minutes of said Court on the 24th day of November, 1942, whereby the order of the Conciliation Commissioner dismissing the above entitled proceeding was affirmed, and from the whole thereof, to the United States Circuit Court of Appeals for the Ninth Circuit.

December 2, 1942.

FRED MANSUR

Attorney for Farm Products  
Co.

12-7-42 Mailed copy to Leo V. Silverstein, U. S.  
Attorney, T. H.

[Endorsed]: Filed Dec. 4, 1942. [33]

[Title of District Court and Cause.]

COST BOND ON APPEAL

National Automobile Insurance Company  
Home Office—Los Angeles

Know All Men by These Presents:

That we, Farm Products Co., as Principal, and the National Automobile Insurance Company, a corporation organized and existing under the laws of the State of California and authorized to transact a surety business in the State of California, as Surety, are held and firmly bound unto the United States of America, in the full and just sum of Two Hundred and Fifty Dollars (\$250.00), to be paid to the said United States of America, its Attorney, executors, administrators or assigns; to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 3rd day of December, in the year of our Lord One Thousand Nine Hundred and Forty-Two.

Whereas, on the 24th day of November, 1942, a Judgment was entered in the District Court of the United States, Southern District of California, Central Division, in the above entitled case and as the Farm Products Co., Debtor, has filed notice of appeal to the United States Circuit Court of Appeals for the Ninth Circuit, in the State of California.

Now, Therefore, the condition of the above obligation is such that if Farm Products Co., shall pros-



ecute its appeal to effect, and answer all costs if the appeal is dismissed or the judgment affirmed, or such costs as the Appellate Court may award if the judgment is modified, then the above obligation to be void; else to remain in full force and virtue.

Acknowledge before me the day and year first above written.

[Seal]                      FARM PRODUCTS CO.  
By FRED MANSUR,  
President  
Principal  
NATIONAL AUTOMOBILE  
INSURANCE COMPANY

[Seal]              By: WILLIAM E. FORTNEY  
Attorney-in-Fact

Examined and recommended for approval as provided in Rule #13.

WM. W. WORTHINGTON

This recognizance shall be deemed and construed to contain the "consent and agreement" for summary judgment and execution thereon mentioned in Rule #13 of the District Court.

The Premium charged for this bond is \$10.00 per annum.

I hereby approve the foregoing bond.

Dated the 5th day of Dec., 1942.

RALPH E. JENNEY,  
Judge

State of California,  
County of Los Angeles—ss.

On this 3rd day of December, in the year 1942, before me, Helengene Duffin a Notary Public in and for said County and State, personally appeared William E. Fortney, known to me to be the person whose name is subscribed to the within instrument as the Attorney-in-fact of the National Automobile Insurance Company, and acknowledged to me that he subscribed the name of the National Automobile Insurance Company thereto as principal, and his own name as Attorney-in-fact.

[Seal]                      HELENGENE DUFFIN  
Notary Public in and for said County and State.  
My Commission Expires Dec. 2nd, 1945.

[Endorsed]: Filed Dec. 5, 1942. [34]

---

[Title of District Court and Cause.]

STATEMENT OF POINTS ON WHICH  
APPELLANT INTENDS TO RELY

Comes now Farm Products Co., a California corporation, debtor in the above-entitled proceeding and appellant therein, and hereby submits a concise statement of points on which it intends to rely on the appeal of the above-entitled proceedings as follows:

1. That the above-entitled District Court erred in affirming an order of the Conciliation Commis-

sioner dismissing proceedings in bankruptcy and vacating a stay order in a civil action between the parties herein.

2. The Conciliation Commissioner erred in finding "that the allegations in farm debtor's petition is not true in that all of the stockholders of the farm products company are persons whose entire time is engaged and whose incomes, and each of them, are more than 75 per centum from their activities and endeavors in producing products of the soil and farming."

That the Commissioner erred in the following: "The Court finds that the primary and principal occupation of Fred Mansur, President of debtor corporation, and owner of at least a 50 per [35] cent interest in said corporation, is not that of a farmer." Appellant contends that the record shows that the entire time of Fred Mansur was devoted to the farming enterprise, and that his activities were those of a farmer.

3. The Conciliation Commissioner erred in vacating stay in pending Civil Action.

Dated: December 11, 1942.

FRED MANSUR

Attorney for Appellant.

[Endorsed]: Filed Dec. 30, 1942. [36]

[Title of District Court and Cause.]

### STIPULATION AS TO RECORD

It is hereby stipulated by and between the parties hereto through their respective counsel that the following hereinafter enumerated parts of the record, proceedings and evidence be included in and shall constitute the record on appeal herein pursuant to Rule 75 (F) of the Rules of Civil Procedure for the District Courts of the United States.

1. Petition of Debtor.
2. Special Appearance of United States of America.
3. Statement of Testimony Before Commissioner.
4. Findings of Fact and Conclusions of Law.
5. Order Dismissing Proceedings.
6. Petition for Review.
7. Commissioner's Certificate of Record on Review.
7. Judgment of District Court Affirming Order of Conciliation Commissioner.
8. Notice of Appeal.
9. Copy of Bond.
10. Statement of Points on Which Appellant Intends to Rely. [37]
11. Designation of Contents of Record on Appeal.
12. This Stipulation.
13. Certificate of Clerk Authenticating the Record.

Dated: December 26, 1942.

LEO V. SILVERSTEIN,

U. S. Attorney

WM. W. WORTHINGTON

Asst. U. S. Attorney

Attorneys for Appellee

United States of America

FRED MANSUR

Attorney for Appellant.

[Endorsed]: Filed Dec. 30, 1942. [38]

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[Title of District Court and Cause.]

### CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 38, inclusive, contain full, true and correct copies of: Petition of Farm Products Co. under Section 75 of the Bankruptcy Act; Certificate of Record on Review; Special Appearance; Notice of Motion to Dismiss Proceedings and to Vacate Stay of Proceedings in Federal Court by Secured Creditor, United States of America; Narrative Statement of Testimony Before Conciliation Commissioner; Findings of Fact and Conclusions of Law; Order Dismissing Proceedings and Vacating Stay of Proceedings in Federal Court; Amended Farm Debtor's Petition for Review of The Order of Conciliation Commissioner C. P. Von

Herzen Purporting to Dismiss This Proceeding; Judgment Affirming Order of Conciliation Commissioner Dismissing Proceedings in Bankruptcy and Vacating Stay in Civil Action; Notice of Appeal; Cost Bond on Appeal; Statement of Points on which Appellant Intends to Rely and Stipulation as to Record which constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the fees of the clerk for comparing, correcting and certifying the foregoing record amount to \$6.95, which amount has been paid to me by the Appellant.

Witness my hand and the seal of the said District Court this 12 day of January, 1943.

[Seal] EDMUND L. SMITH,

Clerk

By THEODORE HOCKE,

Deputy Clerk.

---

[Endorsed]: No. 10345. United States Circuit Court of Appeals for the Ninth Circuit. Farm Products Co., a corporation, Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Filed January 14, 1943.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

In the United States Circuit Court of  
Appeals for the Ninth Circuit

No. 10345

In the Matter of  
FARM PRODUCTS CO.,  
Debtor.

STATEMENT OF POINTS ON WHICH AP-  
PELLANT INTENDS TO RELY AND DES-  
IGNATION OF PART OF RECORD SUB-  
MITTED FOR CONSIDERATION ON AP-  
PEAL.

Farm Products Co., as appellant and Debtor in the above-entitled matter, hereby incorporates by reference herein its Statement of Points on which Appellant Intends to Rely, which was filed in the District Court of the United States, Southern District of California, Central Division, and which is part of the record on appeal of said trial court in said proceeding.

Further, said Farm Products Co. hereby designates the parts of the record on appeal in said proceeding which it thinks are necessary for the consideration thereof as follows:

1. Petition of Farm Debtor.
2. Special Appearance of United States of America.
3. Statement of Testimony Before Commissioner.
4. Findings of Fact and Conclusions of Law.

5. Order Dismissing Proceedings.
6. Petition for Review.
7. Commissioner's Certificate of Record on Review.
8. Judgment of District Court Affirming Order of Conciliation Commissioner.
9. Notice of Appeal.
10. Statement of Points on Which Appellant Intends to Rely.
11. Designation of Contents of Record on Appeal.
12. This Statement of Points on Which Appellant Intends to Rely and Designation of Parts of Record Submitted for Consideration on Appeal.
13. Stipulation Regarding Record on Appeal.
14. Clerk's Certificate of Said Record.

Dated: January 11, 1943.

FRED MANSUR

Attorney for Farm Products  
Co.

Appellant and  
Farm Debtor.

Rec'd. copy of Statement of Points this 12th day  
of January, 1943.

LEO V. SILVERSTEIN

U. S. Attorney

WM. W. WORTHINGTON

Asst. U. S. Attorney

[Endorsed]: Filed Jan. 14, 1943.



No. 10345.

IN THE

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

---

FARM PRODUCTS Co., a corporation,

*Appellant,*

*vs.*

UNITED STATES OF AMERICA,

*Appellee.*

---

## APPELLANT'S OPENING BRIEF.

---

FRED MANSUR,

1020 W. M. Garland Building, Los Angeles,

*Counsel for Farm Debtor.*

FILED

MAR 31 1943



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No. 10345.

IN THE  
United States Circuit Court of Appeals  
FOR THE NINTH CIRCUIT

---

FARM PRODUCTS Co., a corporation,

*Appellant,*

*vs.*

UNITED STATES OF AMERICA,

*Appellee.*

---

APPELLANT'S OPENING BRIEF.

---

Statement of Pleadings and Facts Disclosing Basis of  
Jurisdiction.

Appellant filed its farm debtor petition under Section 75 (a to s) in bankruptcy in the District Court of the United States for the Southern District of California. Petition was filed August 24, 1942.

The United States of America, a secured creditor, appeared specially for the sole purpose of moving to dismiss the proceedings and to vacate stay of proceedings, on the ground:

1. That the farming corporation was not one where 75 per centum of the stock is owned by actual farmers.

2. That the owner of 75 per centum of the stock of said corporation is not an individual who is primarily *bona fide* personally engaged in producing products of the soil, or the principal part of whose income is derived from said farming.

The said court had jurisdiction of said proceedings by virtue of Sections 75R and 75S of the National Bankruptcy Act.

A final order dismissing said proceedings was entered on November 24, 1942.

Notice of appeal was filed by appellant on December 4, 1942.

Order extending time to file appellant's opening brief was made and filed on March 1, 1943.

Appellant relies on the provisions of subdivisions (a) and (b) of Sections 24 and 25(a), Bankruptcy Act, to sustain the jurisdiction of the Circuit Court of Appeals.

The proceedings were completed pursuant to Federal Rules of Civil Procedure, Rule 73 (2), (b), (c) and (g) and Rule 75.

## Statement of the Case and Question Involved.

The United States Government, through the Farm Security Administration, sought people to take over and farm lands from which Japanese were being evacuated. Fred Mansur agreed to farm certain of these lands in Los Angeles County, on what is commonly known as Dominguez Hill. The Farm Security Administration supplied operating funds, taking a chattel mortgage as security for such advances.

A corporation formed for this purpose was incorporated April 21, 1942, as Farm Products Co. The stock was authorized to be issued to Fred Mansur, who had agreed to transfer one-half to one Paul Williams, who was the equitable owner of one-half interest in the venture and in the stock. However, before actual issuance of the stock, the Farm Security Administration ordered any further steps by the corporation to be stopped.

The corporation secured leases on approximately 460 acres of land.

The United States of America filed action 2371-RJ to foreclose the chattel mortgage. [Tr. p. 4.]

The Farm Products Co. then filed its petition as a farm debtor in action 41247 In Bankruptcy. [Tr. p. 2.]

The United States of America appeared specially to move to dismiss the proceedings. [Tr. p. 9.]

Hearing was had before Commissioner C. P. Von Herzen on September 17, 1942, and he held that Fred Mansur, the owner of at least a one-half interest in said debtor

corporation, is not a farmer as defined by Section 75R of the Bankruptcy Act.

A review was granted by the District Court, and it sustained the order of the Conciliation Commissioner. [Tr. p. 37.]

### Question Involved.

Does a corporation whose only business is farming, and whose stock is owned 50% by an actual farmer, and 50% by a former attorney, who abandoned his law practice for the duration of the war, and enlisted in the army to grow food, qualify as a farming corporation?

### Statement of Facts.

Mr. Mansur formed the Farm Products Co. and the stock of the company was authorized to be issued to him; he had agreed to transfer one-half of this stock to Paul Williams, but before this occurred Farm Security Administration requested that no further steps be taken by the corporation. [Tr. p. 12.] Fred Mansur was president of the Farm Products Co. Paul Williams was admittedly a farmer—no question was raised on that score.

Fred Mansur closed his law offices and ENLISTED IN THE ARMY TO RAISE FOOD.

He had previously resided in Los Angeles City; he and his wife personally removed with their household belongings to the farm property; he changed his voting registration to the new precinct. [Tr. p. 13.]

After application had been filed for the issuance of stock of the corporation, the Corporation Commissioner notified Fred Mansur that Paul E. Williams had a previous criminal record and could not be an officer of the company or



have any stock issued to him. Williams then said he was going to take charge of the corporation regardless of the Commissioner and on June 11, 1942, approximately two months after the start of the enterprise, an open break took place between Mansur and Williams.

The Farm Security Administration sided with Williams and by virtue of the provisions of their mortgage ordered Mansur to refrain from any further company activity, and to turn over all administration of the farm to Williams, as their representative.

Mr. Mansur did not resume his law practice. He then returned to the legal office of the company in Los Angeles and continued to busy himself with the affairs of the company in trying to bring about a settlement of the difficulties, but without success and in August Farm Security Administration brought suit to foreclose its mortgage, as previously stated.

At the time of instituting the foreclosure action the farm was planted to cauliflower, cabbage, Kentucky Wonder beans, lima beans, cucumbers, summer squash, and other crops [Tr. p. 3], and the 33 acres of lima beans alone should have produced over \$40,000, or more than the Government loan of \$36,150. [Tr. p. 18.]

Mr. Mansur testified that his duties embraced the formation of the company, negotiating leases, securing a loan from the United States Government, completing banking arrangements, paying labor, buying materials, conferences with Government officials and attending to whatever details required attention. [Tr. pp. 14 and 15.]

By the Farm Plan Mr. Mansur was allowed \$200 per month for living expenses and \$200 per month for operating expenses. [Tr. p. 18.] This was his only income.

## Specifications of Errors Relied Upon.

### I.

The Conciliation Commissioner erred in making and adopting finding of fact No. VI, as follows:

“The Court finds that the primary and principal occupation of Fred Mansur, President of debtor corporation, and owner of at least a 50 per cent interest in said corporation, is not that of a farmer.”

### II.

The Conciliation Commissioner in finding of Fact No. III stated:

“ . . . The Court further finds that the allegation in farm debtor's petition is not true in that all of the stockholders of the farm products company are persons whose entire time is engaged and whose incomes, and each of them, are more than 75 per centum from their activities and endeavors in producing products of the soil and farming.”

Farm debtor is in full agreement with these facts and contends that its petition is therefore true.

### III.

The trial court committed reversible error in sustaining the order of the Conciliation Commissioner dismissing the petition of farm debtor and denying said debtor the protection of the Bankruptcy Act.

## ARGUMENT.

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### Point I.

That the trial court erred in adopting the finding of the Conciliation Commissioner as follows:

“The Court finds that the primary and practical occupation of Fred Mansur, President of debtor corporation, and owner of at least a 50 per cent interest in said corporation, is not that of a farmer.”

for the reason that there is no evidence to support said finding.

The position of the Commissioner is reflected in one sentence of his findings, which reads:

“The Court finds that during the period in question that Fred Mansur was at no time engaged in the manual operations of actual farming, that is, planting, raising, caring for and harvesting farm products on the premises belonging to debtor corporation.”

It is admitted that the manual labor was performed by Mexican employees, over 90 being employed at one time, but it is true also that Farm Products Co. was so actually engaged in such manual operations, regardless of whether they were performed by Fred Mansur or Mexican labor.

AUTHORITIES.

In *Shyvers v. Security-First Natl. Bank*, 108 Fed. (2d) 611, a farm located in Santa Barbara County, owned by a person living in London, England, was operated by lease tenants. The Court said (1, 2):

“We agree that the words ‘*bona fide* primarily personally engaged’ do not mean without any assistants.”

It is self-evident that in the case at bar the actual farm work could not have been carried on by any one individual. It is equally clear that a project of this size required supervision.

“Whether a person is a farmer debtor within the meaning of this title depends in each case on its own facts.”

*In re Chaney*, 39 Fed. Supp. 696.

In *First Natl. Bank v. Beach*, 301 U. S. 439, the Court said:

“The critical fact is that the debtor worked an acreage large enough to count, that he did not work at anything else, and that he gave to this work, whether profitable or unprofitable ‘the major portion of his time.’

\* \* \* \* \*

“We emphasize the fact afresh that the words of the statute to which meaning is to be given are not phrases of art with a changeless connotation. They have a color and a content that may vary with the setting.”

In the instant case Fred Mansur devoted all his business ability to the activities of Farm Products Co. as long as

he was permitted to do so by the Farm Security Administration, and it seems rather unreasonable for them to put an end to such work and then complain that Fred Mansur was no longer farming.

In *Noble v. Hopewell Natl. Bank*, 37 Am. Bkry. Reports (N. S.) 626, the Court said.

“Assuming, however, that a farmer by straightened circumstances is forced to leave his farm in order to support his family, we do not think that he is a farmer any the less. . . .”

### Point II.

The Conciliation Commissioner in finding III, after admitting the corporate entity of Farm Products Co. and its farming operations, uses the rather inept language:

“The Court further finds that the allegation in farm debtor’s petition is not true in that all of the stockholders of the farm products company are persons whose entire time is engaged and whose incomes, and each of them, are more than 75 per centum from their activities and endeavors in producing products of the soil and farming.”

If the facts are as stated by the Court, then it would appear self-evident that the allegation in farm debtor’s petition *is true*.

### Point III.

The trial court committed reversible error in denying to farm debtor the rights and benefits of Section 75 of the Bankruptcy Act.

The trial court apparently adopted the view of the Commissioner “that although Fred Mansur lives on the farm

premises, he has at no time taken any personal physical part in the production of agri-products, . . .” In other words, unless a man actually digs in the soil he is not a farmer.

The Commissioner complained that Fred Mansur “contributed neither funds nor farming equipment”. The United States, through the Farm Security Administration, was using every effort to get individuals to take over and farm the land evacuated by the Japanese, and they agreed to finance the operations, hence there was no necessity for contributions by the farmers.

Fred Mansur considered that he was doing his part in closing his offices for the duration and undertaking to carry on this work of raising food for the Army.

### **Conclusion.**

It is apparent from the facts disclosed herein that Fred Mansur was a farmer, or nothing. He had signed an agreement with the United States Government to farm, and continued as long as they permitted him to do so.

The assets of the corporation were more than sufficient to have paid all loans in full, and we submit that the farm debtor was entitled to sufficient time to pay its debts—which would have been in one year.

We respectfully submit that the trial court's order should be reversed.

Respectfully submitted,

FRED MANSUR,

*Counsel for Farm Debtor.*

No. 10345

IN THE

United States Circuit Court of Appeals  
FOR THE NINTH CIRCUIT

---

FARM PRODUCTS Co., a corporation,

*Appellant,*

*vs.*

UNITED STATES OF AMERICA,

*Appellee.*

---

BRIEF FOR THE UNITED STATES.

---

LEO V. SILVERSTEIN,

*United States Attorney;*

WM. W. WORTHINGTON,

*Assistant United States Attorney,*

U. S. Postoffice and Courthouse

Building, Los Angeles.

*Attorneys for Appellee.*

APR 23 1943

PAUL P. O'BRIEN,  
CLERK





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No. 10345

IN THE

United States Circuit Court of Appeals  
FOR THE NINTH CIRCUIT

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FARM PRODUCTS Co., a corporation,

*Appellant,*

*vs.*

UNITED STATES OF AMERICA,

*Appellee.*

---

BRIEF FOR THE UNITED STATES.

---

Statement of Facts.

The Appellant is a California corporation organized in 1942. The sole authority granted by the Corporation Commission of California for the issuance of Appellant's stock provided that said stock was to be placed in escrow. This was done because the Corporation Commission had been advised that one Paul Williams, an ex-convict, was to have received a 50 per cent interest in the corporation. The stock is now in escrow.

Thereafter the Appellee, through one of its agencies, loaned to the Appellant monies to carry on farming operations upon certain lands the corporation had acquired under a lease or leases. At such time as the loan was made there were growing crops upon the land, together

with farming equipment, livestock and buildings. This loan was “supposedly” secured by a chattel mortgage upon the growing crops, farming equipment, livestock and buildings. The Corporation has had no assets at any time except the loan. The acquisition by the Corporation of the above leases was effected solely because of the fact that the Appellee was making the above loan to the Appellant. The Appellant has at no time been able to produce satisfactory evidence that it was, even as a lessee, entitled to most of the buildings and some of the livestock supposedly covered by the mortgage.

Thereafter, on August 17, 1942, the Appellee brought an action against Appellant to foreclose the above mentioned chattel mortgage, and immediately thereafter the Appellant filed its petition under Section 75 of the Bankruptcy Act, and proceedings were stayed in the foreclosure action until the United States District Court had affirmed the ruling of the Conciliation Commissioner dismissing the bankruptcy proceedings and vacating the stay in the foreclosure action. An appeal was noted from this affirmation of the United States District Court, but no stay was granted or supersedeas bond filed.

Judgment was then entered in the foreclosure proceeding, and the property described in the mortgage was ordered sold by the Receiver then in possession. This sale took place, and upon an order to show cause why the sale should not be approved and confirmed the Appellant herein was given due notice in order that it might appear and object to the approval and confirmation of such sale, but Appellant failed to object and the order was duly made and entered, approving such sale and discharging the Receiver.

### Questions Involved.

It is respectfully submitted that the issue, as framed by the Appellant on page 4 of its brief, assumes a fact not in existence, namely: that 50 per cent of the stock is owned by an actual farmer as this statement necessarily refers to the said Paul Williams and cannot be true from a legal standpoint. This because, as explained in Appellant's statement, the Corporation Commission of the State of California would not allow any stock to be issued to Paul Williams, nor do we think the phrase, ". . . and enlisted in the Army to grow food," a proper one and certainly it is not technically correct. It is respectfully submitted therefore that the questions involved are:

1. WHETHER this appeal presents a moot question.
2. WHETHER the Bankruptcy Act, requiring 75 per cent of a California Corporation's stock to be held by an actual farmer, is complied with where the California Corporation Commission has directed that the stock of such corporation be placed in escrow with right of issuance of only 50 per cent thereof and that same 50 per cent to the Corporation's president who is a lawyer with no intention of being responsible for the Corporation's actual farming.

### Statutes Involved.

National Bankruptcy Act, Section 75.

## ARGUMENT.

### POINT I.

#### **This Appeal Presents a Question That Has Become Moot.**

The Appellant has never had any assets, nor, if the judgment of the District Court should be reversed upon this appeal, would the Appellant be able to set aside the sale under the foreclosure proceedings of the chattel mortgage. There would be no assets for the Bankruptcy Court to exercise jurisdiction over. It is readily perceived from an examination of the authorities passing upon the question whether one is an actual farmer or not, that each and every of such decisions stands upon its own peculiar facts and that a decision of the Appellate Court in the instant case would not even have the attribute of a precedent because of such fact. A decision would have no practical value and we do not believe that Appellant will contend otherwise. Certainly this case does not come within the exceptions delineated by such cases as: *Federal Trade Commission v. Goodyear Tire & Rubber Co.*, 304 U. S. 257; *Panama Refining Co. v. Ryan*, 293 U. S. 388; *Leonard and Leonard v. Earl*, 279 U. S. 392; *McGrain v. Daugherty*, 273 U. S. 135; *Ohio Collieries Co. v. Stuart*, 290 Fed. 1005; *Boise City Irr. & Land Co. v. Clark*, 131 Fed. 415 (CCA 9th Cir.)

## POINT II.

### Intent to Become a Farmer Does Not Per Se Create a Status of Actual Farmer as the Term "Actual Farmer" Is Used in the Bankruptcy Act.

It is respectfully submitted that an attorney, reading the record in this case, is left with the inescapable impression that the activity and connection of Fred Mansur with the Farm Products Company were for the main purpose of increasing his income as an Attorney at Law by the organization of this corporation which would be, he hoped, a remunerative client. The testimony of Fred Mansur shows that he had nothing to do with the planting of crops or actual farm work [Tr. pp. 15, 16]. Mr. Mansur is a well-known attorney in Los Angeles and has been practicing law in this community for a great number of years. He never pretended to do any farming in the State of California, at least until May 6th or 7th, 1942. It is respectfully submitted it was not the intent of Congress that a doctor, lawyer or bootmaker, who overnight might decide to organize a corporation to operate farm lands and become an officer thereof, should be within the definition of "actual farmer", or that one in such class will *ipso factor* become such actual farmer by moving upon the farm lands actually worked by others, not himself, and under the direction and immediate supervision of others. *Shyvers v. Security-First Natl. Bank*, 108 Fed. (2d) 611; *In re Pollack*, 46 Fed. Sup. 358; *Williams v. Great Southern Life Insurance Company*, 124 Fed. (2d) 38 (5th Cir.)

### POINT III.

The Requirement of the Bankruptcy Act for 75 Per Cent Interest of Stock Being Held by an Actual Farmer Does Not Appear to Have Been Complied With by the Farm Products Co.

The record discloses that Fred Mansur concedes that one Paul Williams may perhaps be entitled to fifty per cent of the stock. Whether or not Paul Williams is entitled to the stock is, for the purpose of this proceeding, immaterial as he never had it. The sole basis of the proceedings here must be that Fred Mansur is an actual farmer having 75 per cent of the Appellant's stock or that stockholders of the Farm Products holding 75 per cent of its stock are actual farmers. No other stockholder, as appears from the records of the corporation, had any farming experience. This being the case it is immaterial whether or not Fred Mansur is an actual farmer within the meaning of the Bankruptcy Act, as by his own admission he is not entitled to and does not have the required 75 per cent of the corporation's stock nor, as a matter of fact, has 75 per cent of such stock ever been issued to him nor has he purchased same or any part thereof from any one else.



#### POINT IV.

### A Finding of a Referee in Bankruptcy Confirmed by the District Court if Supported by Substantial Evidence May Not Be Set Aside by the Circuit Court of Appeals.

That the Conciliation Commissioner had substantial evidence upon which to base the finding of fact that Fred Mansur was not a farmer is shown by the admission of Mr. Fred Mansur [Tr. p. 15] as follows:

“The Commissioner asked Fred Mansur how much of his time was spent in the Company’s office between May 7th and August 17th. The answer was four or five days a week.” (The office referred to was the low office of Mr. Mansur.)

It is respectfully submitted that the Commissioner could not have had more substantial evidence before him than the admission of Mansur as above quoted. When this admission is read in connection with the statements that appear on page 14 of the transcript of record it is very obvious that Mr. Mansur was not and is not a farmer and had no intention of learning anything about actual farming in so far as that pertained to the planting, growing and harvesting of crops. The only facts in the record showing that Mr. Mansur knows anything about a farm is that he lived on a farm in New Hampshire up to the age of twenty years, which period most of his time must have been spent at school though this latter fact does not appear in the record. *Bee Dee Management Co. v. Kenyon*, 122 Fed. (2d) 299 (10 Cir.)

The most that can be said on behalf of Appellant was that the record that was before the court shows that a disputed question of fact has been raised as to whether Mansur was an actual farmer, and it is respectfully submitted that this court should affirm the findings of fact made by the Conciliation Commissioner where there is testimony or evidence upon which said findings could be based, more especially so where, as in this case, there is a conflict of testimony.

### Conclusion.

WHEREFORE it is respectfully submitted that this appeal be dismissed or that judgment of the U. S. District Court herein affirming the order of the Conciliation Commissioner dismissing the proceedings in Bankruptcy and vacating the stay of the case of the United States of America, Plaintiff, v. Farm Products Co., a corporation, Defendant, be in all respects affirmed.

LEO V. SILVERSTEIN,  
*United States Attorney;*

WM. W. WORTHINGTON,  
*Assistant United States Attorney,*  
*Attorneys for Appellee.*

No. 10,345

IN THE

19  
United States Circuit Court of Appeals  
FOR THE NINTH CIRCUIT

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FARM PRODUCTS Co., a corporation,

*Appellant,*

*vs.*

UNITED STATES OF AMERICA,

*Appellee.*

---

PETITION FOR REHEARING.

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FILED

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No. 10,345

IN THE

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FARM PRODUCTS Co., a corporation,

*Appellant,*

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UNITED STATES OF AMERICA,

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PETITION FOR REHEARING.

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*To the Honorable United States Circuit Court and the  
Judges Thereof:*

Comes now the United States of America, appellee in the above-entitled cause, and presents this its petition for a rehearing of the above-entitled cause, and presents this its petition for a rehearing of the above-entitled cause, and in support thereof most respectfully shows:

I.

That the omission of the contract between the Farm Securities Administration and the Farm Products Co. from the record on appeal herein was not an inadvertence. This because this case does not involve any rights or obligations of the United States, nor could any contract made by the United States with the Farm Products Co. be an essential

part of the record on appeal as it could not be determinative nor throw any light upon whether the Farm Products Co. came within Section 75 of the Bankruptcy Act.

## II.

This appeal involves the sole question of whether the appellant, Farm Products Co., can avail itself of the provisions of Section 75 of the Bankruptcy Act.

## III.

The admissions of the appellant, Farm Products Co., through its president, Fred Mansur, as contained in the record before this court, sets forth the entire facts upon which appellant and appellee have conceded are determinative of the question here involved.

## IV.

The statement in the opinion of the Circuit Court, "In the Narrative Statement of Testimony Before Conciliation Commissioner, which is a part of the record before the District Court upon review," is not correct, as the District Court had before it not the narrative statement but the reporter's transcript of the hearing. The narrative statement was not prepared until after the judgment of the District Court affirming the Commissioner's Order.

## V.

The opinion of the Circuit Court in stating that no affidavits were certified to the District Court assumes a negative fact which can only be based upon the fact that the record before the Circuit Court did not affirmatively show that such affidavits were before the District Court, *whereas in fact the affidavits were certified to the District Court prior to its decision affirming the Commissioner's Order*

*and were before it at the time of such affirmance.* The record fails to disclose the certification of such affidavits because appellee and appellant have, at all times since the giving of oral testimony before the Commissioner by Mansur, considered said affidavits as being nothing more than opinion evidence, and therefore, irrelevant, or at the most, cumulative.

Wherefore, upon the foregoing grounds, it is respectfully urged that this petition for a rehearing be granted, and that the Order of this court in the above-entitled matter dated the 2d of June, 1943, be, upon further consideration, reversed, or that the appeal herein be dismissed.

Respectfully submitted,

CHARLES H. CARR,

*United States Attorney,*

WM. H. WORTHINGTON,

*Assistant U. S. Attorney,*

*Attorneys for Appellee.*

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**Certificate of Counsel.**

I, Wm. W. Worthington, Assistant United States Attorney, do hereby certify that the foregoing petition for rehearing of this cause is presented in good faith, and not for delay.

WM. W. WORTHINGTON.











